S. Hrg. 98-1250

TO ALLOW CERTAIN SELLERS OF AGRICULTURAL PRODUCTS TO BRING ANTITRUST ACTIONS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2835

A BILL TO AMEND THE CLAYTON ACT TO ALLOW CERTAIN SELLERS OF AGRICULTURAL PRODUCTS TO BRING ANTITRUST ACTIONS

SEPTEMBER 24, 1984

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TO ALLOW CERTAIN SELLERS OF AGRICULTURAL PRODUCTS TO BRING ANTITRUST ACTIONS—S. 2835

MONDAY, SEPTEMBER 24, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:25 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley, (acting chairman) presiding.

Staff present: Lynda Nersesian, chief counsel and staff director; Ally Milder, general counsel, and Veronica Gonzales, legislative aide.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. The committee will come to order.

Today, we are concerned with the issues raised by S. 2835, a bill to allow certain sellers of agricultural products to bring antitrust actions under section 4 of the Clayton Act.

In 1977, the Supreme Court found in the *Illinois Brick* case that only those who deal directly with a violator can sue for price fixing under the antitrust laws. The bill before us today would reverse *Illinois Brick* to the extent of allowing sellers of cattle, hogs, sheep, grains, and soybeans to bring such antitrust actions.

The Judiciary Committees of both Houses of Congress have grappled with the *Illinois Brick* decision and its ramifications since it came down, conducting hearings on this issue every year since 1977. It is an extremely complex and difficult area of the law, and very controversial as well.

I look forward to hearing our witnesses' views on this subject and am confident that their testimony will aid the committee in its deliberations on *Illinois Brick*.

Before I introduce the first witness I wish to place a copy of S. 2835 in the record.

[Text of S. 2835 follows:]

98TH CONGRESS
2D SESSION

S. 2835

To amend the Clayton Act to allow certain sellers of agricultural products to bring antitrust actions.

IN THE SENATE OF THE UNITED STATES

JUNE 29 (legislative day, JUNE 25), 1984

Mr. BAUCUS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Clayton Act to allow certain sellers of agricultural products to bring antitrust actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Agricultural Producers Protection Act".

SEC. 2. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) An action under section 4, 4A, or 4C for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains, or soybeans shall not be barred solely because the person seeking such damages did not sell such products directly to the defendant, except that any person seeking such damages must have possessed the livestock or grain plant for feeding or growing purposes for a period of at least 21 days prior to the date of any such sale.

"(b) In any action under section 4, 4A, or 4C for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains, or soybeans, or the sale of products processed therefrom, the person seeking such damages shall not recover for any amount of any underpayment that has been passed on to other persons who themselves have a cause of action to recover damages for such underpayment under section 4, 4A, or 4C.".

SEC. 3. The amendments made by this Act shall become effective upon the date of the enactment of this Act.

Senator GRASSLEY. Let me introduce our first panel of witnesses.

Mr. Carl King, of Demmit, TX. Mr. King is a farmer and livestock producer and is president of the Texas Corn Growers Association, which represents all the corn growers in Texas.

We also have with us Prof. Donald J. Polden, who is professor of law at Drake University in Des Moines, IA. He has been an instructor in the area of antitrust and trade regulations for 9 years and is currently a visiting professor at the University of Louisville in Kentucky.

Dr. Willard Mueller, who holds the William F. Vilas research professor of agricultural economics at the University of Wisconsin. His area of interest is the study of competition and public policy in the food industry, especially how they relate to antitrust law. Formerly, Dr. Mueller served as Chief Economist of the Federal Trade Commission, holding that position for 9 years.

Gentlemen, I welcome you. We are glad to have you with us today, and you may proceed in the order in which I introduced you. Mr. King, please proceed.

STATEMENT OF A PANEL, INCLUDING: CARL KING, PRESIDENT, TEXAS CORN GROWERS ASSOCIATION; PROF. DONALD J. POLDEN, PROFESSOR OF LAW, DRAKE UNIVERSITY, DES MOINES, IA; DR. WILLARD MUELLER, PROFESSOR OF AGRICULTURAL ECONOMICS, UNIVERSITY OF WISCONSIN

Mr. KING. Thank you, Senator Grassley.

My name is Carl King. I am a farmer, a livestock producer, from Dimmitt, Castro County, TX. I am chairman of the Texas Corn Growers Association, representing the corn growers in the State of Texas. I am a member of both the State of Texas and the National Wheat Growers Association, and also the Texas Sugarbeet Growers Association, the Texas Cattle Feeders, and numerous other farm organizations.

I am interested on behalf of all the farm organizations of which I am a member, and also of those which I represent, in Federal legislation which would preserve the antitrust laws of this Nation. I support the bill pending to amend the Clayton Act

In the interest of time, Senator, I would ask you, if you would, please, to insert for the record my testimony, 50 copies of which I sent to your office earlier, and that way, I can brief this up and save some time.

Senator GRASSLEY. Without objection so ordered. Please summarize, and the entire statement will be included in the record as you submit it.

Mr. KING. Thank you. I would like to make some statements, though, briefly, as I go along.

Beginning with the holding of the U.S. Supreme Court in *Illinois Brick Co.* v. *Illinois,* the Federal courts have unduly restricted the antitrust laws as they have been interpreted since the historical cases of 1911 down to this time, in such a fashion that agricultural producers have been deprived of any relief for their injuries and damages sustained through unlawful conspiracies, combinations, and monopolies to reduce prices, to keep prices low, and to prevent the law of supply and demand from working in a normal way.

Information is the very life of the free enterprise system. Information concerning supply factors and information concerning demand factors establish the prices in the marketplace, as the basis upon which our products are sold and bought. When conspirators are able to keep secret and to keep from the public the information to which the public is entitled, prices cannot follow the true influences of either supply or demand. Likewise, conspiratorial agreements between purchasers of farm products which result in fictitious information intended to be relied upon by all purchasers of such products most assuredly results in violations of section 1 of the Sherman Act. One or more large purchasers conspiring with individuals and controlling information and thus, controlling the true factor influencing prices results in price-fixing in favor of the violators.

Although *Illinois Brick* applies to a purchase—the State of Illinois—as a third or fourth purchaser down the line from the conspirators of the illegal combination to fix the price of brick, the courts have applied that principle as meaning only the first purchaser could maintain a suit. As to the agricultural sellers, these sellers ordinarily sell into the market through small business cooperatives and independent purchasers.

Nevertheless, under the present interpretations of *Illinois Brick,* even though this market has been materially and unnaturally influenced and distorted, the agricultural producers of grain and livestock have not been permitted to sue the violators, except where sales are made directly to the violator, as you stated in your opening statement, Senator.

This is certainly a departure from the intent of the antitrust laws and their private enforcement, which have protected the free enterprise system and the law of supply and demand for more than 90 years prior to the holding in *Illinois Brick* in 1977.

In fact, the history of the antitrust laws of this country began in the 1980's, to protect agricultural markets from anticompetitive activities. The need is even greater now than it was in the beginning for the protection of agricultural producers entitled to markets free from collusion and conspiratorial acts intended to destroy the long-honored free enterprise system.

The primary reason for the passage of the Sherman Act in 1890 was to protect producers, particularly agricultural producers, from monopolies and price-fixing combinations made for the purpose of preventing agricultural producers from receiving a fair price for their products; that is, a price based upon information, the information based upon the very foundation and basis for a free, unfettered market, and a market based upon all information relating to supply, on the one hand, and demand, on the other.

And I just happened to pick up a Business Week, Senator, that has today's date on it, "The New Food Giants." I do not know whether you have seen one or not. It has a real nice picture of a plate and knives and forks. "Mergers are reshaping industry." It is on page 132, and I would be glad to leave a copy for you, in case you have not picked one up. To me, that is what is taking place in the food industry today, the mergers and so forth. I am not saying that is unlawful, illegal. I am just saying that is the trend, and these smaller boys are selling out to the big boys, in fact. But it is an interesting article, and I thought it might be worthwhile mentioning.

Iowa State economists state that since 1976, when we talk about retail chain stores, the average price of beef that was sold—average loss, actually, rather—was $10 per head. Now, that is on the average, and I know I could relate to that in many of my own cases. I was fortunate—I ran out of money, so I quit buying the beef. But I am sure that average is probably pretty close to correct.

The retail chain stores, in cases filed in and since the year 1974, have been dismissed by courts relying on the authority of *Illinois Brick,* because the agricultural producer sold to packers of beef, who in turn sold to the retail chains, the violators. These cases were based on *Illinois Brick,* since the cattlemen had not sold their product to a direct price-fixing purchaser.

The wheat farmer antitrust cases, in another instance, filed in late 1972, were based upon an alleged conspiracy of Continental Grain Co. and Clarence Palmby, a former Under Secretary of Agriculture in the Nixon administration, to withhold information concerning the great Russian wheat sale of 1972. It was alleged that all information concerning the drought in Russia and the facts leading up to and the potential for the purchase of the largest wheat sale ever made in this country was alleged not to have been conveyed to the farmer. As part of the conspiracy, it was alleged that this information was withheld from the public until late September of 1972.

These suits withstood motions to dimiss and motions for summary judgment. Nevertheless, based on *Illinois Brick*, the majority of agricultural producers were without relief because they sold to purchasers of grain and farmer cooperatives and did not sell directly to Continental Grain Co. or one of the big five grain exporters alleged to have been involved in these conspiracies. As a result, wheat farmers were denied legal redress for actions alleged to have kept the price of wheat and other farm products low from May of 1972 until September of 1972. The laws of supply and demand and the free enterprise system were diminished and destroyed by such alleged wrongful conspiracies, conspiratorial acts and monopolies, and could go on today unaffected by the antitrust laws under *Illinois Brick*.

Now, I am going to skip through some of this, Senator, that we will go ahead and put in the record, with your permission. I would just like to brief it up a little further.

Agriculture has been hurt during the past 7 years, and it will continue to suffer. The result will be injuries which may have an important impact in changing our current way of life. The agricultural producer, as an indirect seller, must have standing in the courts to recover damages for injuries sustained from antitrust violations.

Antitrust violations sanctioned by *Illinois Brick* will result in price increases to the consumer as well as unbearable losses to the producer. Agricultural producers do not seek to increase the cost to consumer. Agricultural producers are merely seeking to receive the fair price for their products.

Getting to the farm producer dilemma, as you are well aware, Senator, and most of the people in America are, as a result of the low prices since 1972 and the financial losses to grain and cattle producers since such time, the farm producers and cattle producers have been forced to mortgage their land and every asset. Many have been forced into foreclosure proceedings, and many are threatened with foreclosure today. The farm system as we know it rests on the ability of the farm and livestock producer to generate an annual profit from his operation to keep him viable and in business. Our present predicament is a result certainly in part due to the position occupied by monopolistic concerns economically powerful enough to control the markets, to fix prices, and to maintain monopolistic powers.

The ability for producers to seek redress in the courts for the wrongs committed would be one of the most important factors in solving the producers' marketing problems. The producer must have his day in court when he is wronged and must be feared for having the potential of access to the court in the future. If he does not, the individual independent producer of meats and grains will continue to be forced out of business.

A strong agricultural and livestock industry should be recognized as the basis for a strong America. The Government monopoly in Russia, as distinguished from a free enterprise system maintained for the benefit of the producer, has been the biggest hinderance to the Russian society. We do not want this to happen in America, not at the hands of our Government, but at the hands of private concerns that can violate the antitrust law.

The great and powerful companies with monopolistic powers defy the Government, the Congress, and the small independent farmers and producers.

The most flagrant violations in the nature of market control, monopoly, conspiracy and price-fixing seems to take place in the agricultural industry because it is without any effective antitrust deterrent. This indicates that these powerful companies do not even believe they should be subject to antitrust laws, and the result is the weak, unrecognized, unorganized producers are helpless.

These types of acts are reflected in what some have termed the great Russian wheat scandal of 1972, concerning which numerous books have been written, as most of you know, about this particular sale.

The information concerning the sale to Russia in 1972 was found by the Jackson committee—I am sure you are familiar with that—to have been matters which the Agriculture Department should have notified the agricultural producers. The law required such notice. This was not done. The officers of Continental Grain Co., in hearings before the Jackson committee, admitted they violated the law and did not file the forms required of them.

The importance of immediate consideration. As a farmer and a producer myself of grains and wheat, I have met many times during the past years with farmers and cattlemen throughout this country. I know their problems. Their problems are just like mine and those of my neighbors. I know what is taking place, and I do not exaggerate in this statement. I have seen what has happened to the farmer by these conspiracies, conspiratorial actions and monopolies, and to the financial position of these many independent farmers all across the country. I know what we face at the marketplace.

I have talked and visited with many consumer groups and with the managers of many farmer cooperative grain associations. I am fully aware of the financial position of myself, and I can truly state to you, proved by my auditor, that I have lost over $1 million in the last 4½ years in my own operation, in 30 years of work. And I am just one case of many, many in America.

In conclusion, Senator, I urge your consideration and passage of Senate bill 2835 and House bill 5264, for the benefit of the agriculture industry. Its importance to this country is unsurpassed. The only way to maintain a strong and stable agricultural economy is through the antitrust laws as we have known them throughout the years before *Illinois Brick*.

Farmers and cattlemen must be protected against economic giants and placed on equal footing with these companies. One way of achieving this goal is to reinforce the antitrust laws by allowing farmers and cattlemen the right to sue price-fixers that are more than one step removed in the distribution chain.

I personally was the chairman of a rather large cooperative elevator in Texas that built a corn wet milling plant, and was forced to lease this plant on a lease/purchase agreement with Amstar Corp., because of a loss we incurred with cornstarch due to the dropping of the price, in a conspiracy that we sued for and collected. We were fortunate in that case that we sold directly, we did not have to sell to a distributor. So that was the reason we were able to use it—one of the very few. But 99 percent of them, Senator, are not allowed to do that under *Illinois Brick,* as you know.

This pretty well concludes my evidence. I thank you for the opportunity of inviting me here today, and any questions, I would be happy to answer.

Thank you, sir.

Senator GRASSLEY. Thank you, Mr. King.

[The following was received for the record:]

PREPARED STATEMENT OF CARL KING

My name is Carl King. I am a farmer and livestock producer from Dimmitt, Castro County, Texas. I am President of the Texas Corn Growers Association, representing all of the corn growers in Texas. Our associaton is a member of the national association. I am a member of both the State of Texas and the National Wheat Growers Association, and also of the Texas Sugarbeet Growers Association, the Texas Cattle Feeders Association and of numerous other farm organizations as well as the Farmers Cooperative Association in Dimmitt, Texas, which association handles the farmers' corn grain sorghum and Wheat products grown in Castro County, Texas.

I am interested on behalf of all the farm organizations of which I am a member and also of those which I represent in federal legislation which would preserve the antitrust laws of this nation. I support the bill pending to amend the Clayton Act.

PROPOSED BILL

The proposed amendment would allow sellers of agricultural products to bring antitrust actions when their market is destroyed by conspiracies which have in the past and which would in the future affect the principles of free trades and free enterprise system of our nation.

The bill is referred to as the "Agricultural Producers Protection Act". For brevity, such bill will be recited here.

REASONS FOR THE AMENDMENT

Beginning with the holding of the United States Supreme Court in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), the Federal Courts have unduly restricted the antitrust laws as they have been interpreted since the historical cases of 1911 down to this time in such a fashion that agricultural producers have been deprived of any relief for their injuries and damages sustained through unlawful conspiracies, combinations and monopolies to reduce prices, to keep prices low and to prevent the law of supply and demand from working in a normal way.

The bill would amend Section 4 of the Clayton Act to maintain our free enterprise system and to assure producers of cattle, hogs, sheep, grains and farm products of a free and open market based upon supply and demand, rather than having the same destroyed by virtue of such conspiracies and monopolies intended to fix prices, all contrary to the free enterprise system and the law of supply and demand.

INFORMATION

Information is the very life of the free enterprise system. Information concerning supply factors and information concerning demand factors establish the prices in the marketplace, as the basis upon which our products are sold and bought. When conspirators are able to keep secret and to keep from the public the information to which the public is entitled, prices cannot follow the true influences of either supply or demand. Likewise, conspiratorial agreements between purchasers of farm products which result in fictitious information intended to be relied upon by all purchasers of such products most assuredly results in violations of Section 1 of the Sherman Act. One or more large purchasers conspiring with individuals and controlling information, and thus controlling the true factor influencing price results in price-fixing in favor of the violations.

EXAMPLES

Although *Illinois Brick* applied to a purchaser (the State of Illinois) as a third or fourth purchaser down the line from the conspirators of the illegal combination to fix the price of bricks, the courts have applied that principle as meaning only the first purchaser could maintain a suit. As to the agricultural sellers, these sellers ordinarily sell into the market through small business cooperatives and independent purchasers. Nevertheless, under the present interpretations of Illinois Brick, even though this market has been materially and unnaturally influenced and distorted, the agricultural producers of grain and livestock have not been permitted to sue the violators, except where sales were made directly to the violator, as you stated in your opening statement Senator.

This is certainly a departure from the intent of the antitrust laws and their private enforcement which have protected the free enterprise system and the law of supply and demand for more than 90 years prior to the holding in *Illinois Brick* in 1977. In fact, the history of the antitrust laws of this country began in the 1980's to protect agricultural markets from anti-competitive activities. The need is even greater now than it was in the beginning for the protection of agricultural producers entitled to markets free from collusive and conspiratorial acts intended to destroy the long honored free enterprise system.

The primary reason for the passage of the Sherman Act in 1890 was to protect producers, particularly agricultural producers, from monopolies and price fixing combinations made for the purpose of preventing agricultural producers from receiving a fair price for their products; that is, a price based upon "information", the information based upon the very foundation and basis for a free, unfettered market, and a market based upon all information relating to supply on the one hand and demand on the other. (21 Congressional Record 4098, 1890)

RECENT TRANSGRESSIONS AND VIOLATIONS IN WHICH THE RECENT COURT HOLDINGS PROTECT THE WRONGDOER AND LEAVE THE AGRICULTURAL PRODUCER NAKED AND WITHOUT RECOURSE

One. The retail chain stores, in cases filed in and since the year 1974, have been dismissed by courts relying on the authority of *Illinois Brick* because the agricultural producer sold to packers of beef who in turn sold to the retail chains, the violators. These cases were based on the *Illinois Brick* since the cattleman had not sold their product to a direct price-fixing purchaser.

Two. The wheat farmer antitrust cases in another instance filed in late 1972 were based upon an alleged conspiracy of Continental Grain Company and Clarence Palmby, a former Under Secretary of Agriculture in the Nixon Administration, to withhold information concerning the great Russian wheat sale of 1972. It was alleged that all information concerning the drought in Russia and the facts leading up to and the potential for, purchase of the largest wheat sale ever made in this country was alleged not to have been conveyed to the farmers. As part of the conspiracy, it was alleged that this information was withheld from the public until late September, 1972. These suits withstood motions to dismiss and motions for summary judgment. Nevertheless, based on *Illinois Brick,* the majority of agricultural producers were without relief because they sold to purchasers of grain and farmer cooperatives, and did not sell directly to Continental Grain Company or one of the big five grain exporters alleged to have been involved in these conspiracies. As a result wheat farmers were denied legal redress for actions alleged to have kept the price of wheat and other farm products low from May of 1972 to September of 1972. The laws of supply and demand and the free enterprise system were diminished and destroyed by such alleged wrongful conspiracies, conspiratorial acts and monopolies, and could go on today, unaffected by the antitrust laws under *Illinois Brick.*

PRINCIPAL REASON FOR AMENDMENT

The principal reason for the proposed legislation is the need to protect certain markets, predominately the markets of farmer/producers throughout the country who sell their agricultural products and other raw materials into the network of cooperatives and independent grain elevators, which is then in turn sold to the large grain purchasers. The network and system of the middlemen-handlers of grain, from the agricultural producer to the grain exporters, is part of a system which has existed throughout all the years—a system open to tampering by its very nature. The potential for conspiracies, conspiratorial conduct and oligopolies entered into and/or maintained by the huge grain companies affect the whole network and system of grain trade and have the potential for preventing the laws of supply and demand from properly working, and has the potential of destroying the free enterprise system as we know it.

There should be no question as to the importance of this allowing producers access to the courts under theories of the antitrust laws. This importance cannot be understated, as these products form a large nucleus of commerce and productivity and provide for adequate living standards in this country.

As recognized in the passage of the Sherman Act, and in the congressional intent of maintaining viable antitrust laws, the importance must be recognized of the inherently weak bargaining position of the producers and sellers of agricultural products from the farm. The importance of protecting this individual small farmer/producer throughout the country (who is the very basis of our agricultural system) from the predatory and monopoly powers of the economically and strong, powerful and dominant purchasers and distributors is the very basis of maintaining and fortifying our strong agricultural position of this country, so different from that of Russia and many foreign countries by virtue of the effectiveness of our antitrust laws.

If the primary producer of agricultural products is not allowed access to courts under the Sherman Clayton Acts when their markets are impaired, affected, destroyed or not permitted to work in a free and unfettered manner, based on true factors of supply and demand then the problems which our great country was faced with the banks, railroads, grain companies and meat packers in the late 1800's and early 1900's will be dwarfed by the potential problems that modern day agricultural producers, as well as the consumers of agricultural goods, will face in the future. Dilluted antitrust laws are tantamount to condonance.

Our congressional statesmen in the late 1800's and early 1900's saw the need for quick and effective legislative action, resulting in the passage of the Sherman and Clayton Acts. If our present day agricultural industry is to be preserved and maintained, and its importance in the field of competition in the food industry preserved so that all members of our society can continue to have its benefits, strong and decisive action must be taken now to insure its continued protection. This protection cannot come from the judicial system, nor from the executive branch of government. It must come from here—our Congress. Congressional statesmen who can perceive and understand the importance of these matters must furnish and give the leadership and direction necessary at this time.

Agriculture has been hurt during the past seven years and it will continue to suffer; the result will be injuries which may have an important impact in changing our current way of life. The agricultural producer, as an indirect seller, must have standing in the courts to recover damages for injuries sustained from antitrust violations.

Antitrust violations sanctioned by *Illinois Brick* will result in price increases to the consumer as well as unbearable losses to the producer. Agricultural producers do not seek to increase the cost to consumers. Agricultural producers are merely seeking to receive the fair price for their products, and a long established free enterprise system based on the laws of supply and demand, unfettered and free of conspirators, conspiratorial acts, monopolies and oligopolies. Left untouched, large, powerful companies have the potential of pushing prices down to the producer and at the same time to raise prices to the consumer.

FARM PRODUCER DILEMMA

As a result of the low prices in 1972 and the financial losses to grain and cattle producers since such time, the farm producers and cattle producers have been forced to mortgage their land and every asset. Many have been forced into foreclosure proceedings and many are threatened with foreclosure today. The farm system as we know it rests on the ability of the farm and livestock producer to generate an annual profit from his operation to keep him viable and in business. Our present predicament is a result certainly in part due to the position occupied by monopolistic concerns economically powerful enough to control the markets, to fix prices and to maintain monopolistic powers.

The ability for producers to seek redress in the courts for the wrongs committed would be one of the most important factors in solving the producers marketing problems. The producer must have his day in court when he is wronged and must be feared for having the potential of access to the court in the future. If he does not, the individual independent producer of meats and grains will continue to be forced out of business.

A strong agricultural and livestock industry should be recognized as the basis for a strong America. The government monopoly in Russia, as distinguished from a free enterprise system maintained for the benefit of the producer, has been the biggest hinderance to the Russian society. We don't want this to happen in America, not at the hands of our government, but at the hands of private concerns that can violate the antitrust laws.

THE GREAT AND POWERFUL COMPANIES WITH MONOPOLISTIC POWERS DEFY THE GOVERNMENT, THE CONGRESS AND THE SMALL INDEPENDENT FARMERS AND PRODUCERS

The most flagrant violations in the nature of market control, monopoly, conspiracy and price fixing seem to take place in the agricultural industry because it is without any effective antitrust deterrent. This indicates that these powerful companies do not even believe they should be subject to antitrust laws, and the result is the weak, unrecognized, unorganized producers are helpless. These types of acts are reflected in what some have termed the great Russian wheat scandal of 1972, concerning which numerous books have been written, including, "The Great American Grain Robbery and Other Stories", written by Martha M. Hamilton, an agri-business accountability study published in late 1972; and, the "Merchants of Grain, the Power and Profits of the Five Giant Companies at The Center of the World Supply", written by Dan Morgan, published by the Viking Press of New York in 1979, with the fifth printing in December of 1979, filed in the Library of Congress, and simultaneously published in Canada by Penguin Books, and numerous other publications.

In 1973 the Senate Subcommittee headed by the late Senator Jackson made a report which is outstanding and any senator familiar with this Jackson Report, concerning the 1972 grain sale to Russia, would necessarily be convinced of the comspiracies which have taken place. Historically, and even up to this date, the various grain companies furnish to the Agriculture Department their corporate officials and employees for service to the Secretary of Agriculture. The Department of Agriculture employees likewise are readily employed and travel from company to company. The closeness of the big exporting companies and the Agriculture Department is frightenly evident.

Most interesting is the fact (as established by the Investigating Committee of Senator Jackson's Committee in 1972-1973 that on January 31st, President Nixon requested Secretary of State Kissinger to contact Secretary Butz of Agriculture and arrange a sale to the Russians of American grain, and to determine the method of financing the sale. Secretary Butz, on that same day, assigned the task to Clarence Palmby, First Assistant and in charge of CCC Stocks, who that night was contacted by Michel Fribourg, owner of Continental Grain Company.

The information concerning the sale to Russia in 1972 was found by the Jackson Committee to have been matters which the Agriculture Department should have notified the agricultural producers. The law required such notice. This was not done. The officers of Continental Grain Company, in hearings before the Jackson Committee, admitted they violated the law and did not file the forms required of them. They did not even tell their secretaries of the sale which should have been reported, for fear the information would leak out and become public information. This was information which the public was entitled to have under the law.

The antitrust laws have always been the relief of the agricultural producers. Now farmers and cattlemen are deprived of the benefits of these laws. We are only asking the Congress to restore the law as it was and as it has been for so many years prior to *Illinois Brick*.

We particularly adopt and call your attention to the testimony of Mr. Glenn Freie, and especially pages 8 through 26.

IMPORTANCE OF IMMEDIATE CONSIDERATION

As a farmer and producer of grains and meat, I have met many times during the past years with farmers and cattlemen throughout this country. I know their problems. Their problems are just like my problems and those of my neighbors. I know what is taking place and I do not exaggerate in this statement. I have seen what has happened to the farmer by these conspiracies, conspiratorial actions and monopolies, and to the financial position of these many independent farmers all across the country. I see and know what we face at the market place.

I have visited and talked with many consumer groups and with the managers of many farmer cooperative grain associations. I am fully aware of the financial position of myself and my farmer/neighbors throughout the farming sections of every state. I have observed the manner in which farm prices are manipulated and handled by great, strong and powerful corporations throughout the distribution chain. I know that the farmers at many meetings have tried to determine what course of action they should take. They deplore the position that they have no power to present their cases for redress by the courts of this land, only because they did not sell directly. Many farmers and cattlemen believe their markets have been transferred and have been taken away from them. Many believe there is no longer a free enterprise system provided for marketing their products. Many believe that the markets are not now dependent upon the law of supply and demand because the factors effecting the laws of supply and demand are being wrongfully withheld. Many believe that the true market situation is being altered by strong corporations able to control all of these factors. Many believe that large companies ignore justice and the free enterprise system, setting as a goal the ability to rig markets and to fix prices, destroying the very basis of our American agricultural economy.

CONCLUSION

I urge your consideration in passage of the Senate/House Bill—for the benefit of the agricultural industry. Its importance to this country is unsurpassed. The only way to maintain a strong and stable agricultural economy is through the antitrust laws as we have known them throughout the years before *Illinois Brick*.

I plead that farmers and cattlemen have access to our courts for these violations. The agruments of crowded court dockets and insufficient number of federal courts and judges be overcome do not outweigh the long term benefit of depriving the agrarian producer-citizens of their day in court. The courts should be informed by Congress that they are not to legislate, that they are not to assume or take over that legislative role.

Farmers and cattlemen must be protected against economic giants and placed on equal footing with these companies. One way of achieving this goal is to reinforce the antitrust laws by allowing farmers and cattlemen the right to sue price fixers that are more than one step removed in the distribution chain. Therefore, I respectfully urge this committee to favorably recommend passage of Senate/House Bill No. S. 2835.

Senator **Grassley**. Professor Polden, I will go and vote now, and return shortly.

Professor **Polden**. Fine.

[Short recess.]

Senator **Grassley**. Thank you for your patience.

We will go on now to Professor Polden.

Professor **Polden**. Thank you, Senator.

First of all, I would like to express my pleasure at being permitted to appear before the committee and express my views on Senate bill 2835, which is, I believe, an important piece of legislation.

I might note at the beginning that many of my attitudes and views on this bill, and indeed, my opinions on the entire matter of the *Illinois Brick* decision, have been shaped by 9 years of teaching and research in the area of antitrust law and trade regulation policy, and several years' experience in the litigation of antitrust cases, such as the beef industry litigation, the AT&T litigation, and some others.

Today, I would like to briefly discuss some of the purposes or objectives that Senate bill 2835 is intended to achieve and briefly note its significance or importance to the agricultural sector. Then

I would like to address the failures of the *Illinois Brick* decision, pointing out some areas where it has not accomplished what the U.S. Supreme Court had hoped it would accomplish; and finally, to demonstrate how Senate bill 2835 would further the primary objectives of the antitrust laws.

In doing so, I will depart significantly from my written statement and offer some additional insights I have on these matters.

First of all, with respect to purposes or objectives, I see three principal purposes or objectives that could be served by Senate bill 2835. First of all, it would, as Senator Grassley pointed out earlier, displace the prohibitive effect of the *Illinois Brick* decision, which has caused the dismissal of several important antitrust cases brought by agricultural producers and which has virtually denied access to the courts to these producers.

Second, the bill would serve to recognize the unique place of agricultural producers in our economy and our society and would extend to those persons the ability to protect themselves from anticompetitive conduct and from monopolistic or oligopolistic trends in agricultural markets.

Third, and perhaps most importantly, the bill seeks to avoid some of the failures of the *Illinois Brick* rule, while strongly advancing some of the policy objectives of the antitrust laws.

I will defer to the comments that Mr. King has made and that Dr. Mueller will make, concerning the significance of the agricultural sector in our society and would, instead, like to discuss the effect that Senate bill 2835 is likely to have on antitrust objectives.

I believe that Senate bill 2835 furthers a trio of goals or objectives behind the antitrust laws. Those are, first of all, the objective of deterrence against anticompetitive conduct and improper market structure; second, to award compensation for injured parties; and third, to instill some equity in balancing social and economic harm against private benefits and to recognize the problems of maintaining an efficiently managed judiciary.

First, with respect to the deterrence objectives. If enacted, this bill would enlarge the class of prospective plaintiffs—that is, private attorneys general, as they are called—to at least three different classes, rather than, at the current time, only one class of prospective plaintiffs which is comprised of direct purchasers or sellers. If enacted, then, this bill would permit and recognize the right of indirect purchasers or sellers, State attorneys general, as well as direct sellers and purchasers, to maintain an antitrust action.

Perhaps more importantly with respect to the antitrust laws' deterrence objectives, recognition must be given to the fact that often the indirect seller or the indirect purchaser may be the only private enforcer. Experience has demonstrated that very often—and this is particularly true in agricultural sectors—the direct sellers have not demonstrated any great interest in suing the purchasers of these products. And so we have a vacuum of enforcement, a vacuum in the area that would be filled if this bill is enacted, by permitting the indirect sellers to maintain an action.

Finally, with respect to the deterrence policy, for reasons I will address a little bit more fully in a moment, deterrence may be enhanced—and indeed, the interest of the defendants may be advanced—if this bill is passed, because enforcement actions would be brought much more speedily. One aspect of this bill seeks to induce or provide incentives to indirect sellers to maintain their action as quickly as possible. I think this would certainly redound to the advantage of the potential defendants, because they would be put on notice of potential claims against them, and certainly could clean up whatever anticompetitive practices they are engaged in or are accused of engaging in.

Second, we have the objective of compensation to injured parties. The bill, very simply, would let indirect sellers recover their actual damages and, in instances where direct sellers also sue, would not require defendants to pay for more damages than they cause. In other words, the defendants would only pay for the harm that they imposed on the indirect sellers.

Finally, the equitable considerations in the bill, I believe, are quite significant. The bill, if enacted, would permit injured agricultural producers to recover damages. As it stands right now, some types of indirect sellers and buyers fall within judicially created exemptions and they can get their case to trial. This has not been true with respect to agricultural producers. At my last count, there were at least eight judicially created exceptions to the rule in *Illinois Brick,* as well as the two exceptions to the rule in *Illinois Brick* that the Supreme Court noted. A number of indirect purchasers or sellers have been able to avoid the proscription of *Illinois Brick* by falling within these various classes of exceptions. That has not been true with respect to the agricultural producers.

The bill would not require the defendants to pay for more damages than they caused under the antitrust laws. The bill would not permit duplicative recovery against any groups of defendants. Rather, the bill limits agricultural producers to their own damages where direct sellers also sue the defendants and recover a judgment. I think that there is clearly an incentive provided to prospective plaintiffs, whether they are direct sellers, indirect sellers, or State attorneys general, to move expeditiously the filing and maintenance of their lawsuits.

Finally, the bill imposes a burden of demonstrating the impact of duplicative recoveries, or the fact of duplicative recoveries, upon the defendants. That is the proper place for that burden because those defendants most often have the information necessary to allocate damages in those instances.

In conclusion, Senator, I would state that I believe that the bill is sound, that it addresses a particular problem of interest to a very important sector in our society, and it certainly corrects problems that have been created by an overly broad U.S. Supreme Court decision. I would urge its adoption.

That is the conclusion of my remarks. If you have any questions, I would be glad to answer them.

Senator GRASSLEY. Thank you, Professor Polden.

[The following was received for the record:].

STATMENT OF DONALD J. POLDEN[1] ON S.2835, BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE, SEPTEMBER 24, 1984

This Committee has pending before it a bill to amend the Clayton Act to permit agricultural product sellers to maintain private causes of action under the federal antitrust laws. This bill, S.2835, is referred to as the Agricultural Producers Protection Act, and, in substantive part, provides as follows:

> "SEC. 2. **The Clayton Act** (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:
>
> "SEC. 4I. (a) An action under section 4, 4A, or 4C for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains or soybeans shall not be barred solely because the person seeking such damages did not sell such products directly to the defendant, except that any person seeking such damages must have possessed the livestock or grain plant for feeding or growing purposes for a period of at least 21 days prior to the date of any such sale.
>
> "(b) In any action under section 4, 4A, or 4C for damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grain, or soybeans, or the sale of products processed therefrom, the person seeking such damages shall not recover for any amount of any underpayment that has been passed on to other persons who themselves have a cause of action to recover damages for such underpayment under section 4, 4A, or 4C."
>
> SEC. 3. The amendments made by this Act shall become effective upon the date of the enactment of this Act.

I am appearing before this committee today to speak in favor of S. 2835 because I believe that agricultural communities in our Nation are deserving of, and have historically been recipients of, exemptions under the federal antitrust laws, and because trends within may agricultural markets, and across the agriculture industry generally, strongly suggest that competition may soon be a forgotten principal in those markets. This Bill, if enacted, would provide a source of self-protection to important members of those markets and it may indeed retard, and ultimately reverse, the growth of those trends.

I also support this Bill because I believe it would result in a more equitable treatment of antitrust claims by agricultural producers. The adverse impact of the Illinois Brick Co. v. State of Illinois, 431 N.S. 720 (1977) decision appears to fall more harshly on plaintiffs seeking redress in cases involving agricultural markets than plaintiffs seeking damages for injuries in non-agricultural markets. Agricultural products are certainly important enough in our economy and society to warrant serious consideration of legislation permitting fair and equitable use of the antitrust laws to protect against monopolies and restraints of trade.

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[1] The author is Visiting Professor of Law, University of Louisville, and Professor of Law at Drake University, in Des Moines, Iowa.

Finally, my support for S.2835 is premised on my conviction that the Bill accommodates the legitimate policy concerns expressed by the Supreme Court in the Illinois Brick decision. Serious questions of judicial efficiency and concern for undue complexity in antitrust litigation and of duplicative recoveries are presented whenever parties distant in the chain of product distribution are permitted to assert claims for damages. This Bill, I believe, adequately anticipates those legitimate concerns and provides for resolution of these concerns while providing a right of action for agricultural producers.

I. Operation and Purposes of S.2835

The text of S.2835 is straight forward and its purpose comports with the language. The purpose of the legislation is to provide agricultural producers with an ability to recover for damage suffered because of anticompetitive conduct by firms, entities or individuals in related agricultural markets. The Bill ameloriates the effect or impact of the Supreme Court's decision in Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (1977), and would permit antitrust suits by agricultural producers who, although distant or remote from the antitrust violators in the product chain of distribution, have in fact suffered economic injury through unlawful conduct, such as price-fixing or monopolizing conduct, engaged in by purchasers of their products.

Significantly, the proposed legislation is limited in its availability only to producers of cattle, hogs, sheep, grains and soybeans who have had possession of those products for 21 days or more. In other words, the only parties who can avail themselves of the provisions and rights under the act are very traditional producers of those agricultural products (i.e., farmers, cattlemen, ranchers, etc.). The Bill would not be applicable to persons or business entities purchasing the products for short periods of time and for purposes of speculation, arbitrage, or finishing.

More significantly, yet, the Bill limits the amount of damages recoverable by the proper plaintiffs to underpayments actually absorbed or suffered by the plaintiffs; they may not recover for underpayments passed on to others in the chain of distribution where those persons or firms would have a cause of action for underpayments suffered. Finally, the Bill becomes effective on the date of enactment and is not retroactive in providing a right of action in cases where the plaintiffs complaint was dismissed under the rule in Illinois Brick.

II. Antitrust and Agricultural Markets

As previously indicated, one important reason for approval of this legislation is the historical solicitude given by the Congress to the problems of anticompetitive behavior in agricultural markets. Both the history of the Sherman Act and the various exemptions from usual operation of the antitrust laws indicate that protection of agricultural markets and producers was an instrumental reason for passage of the Sherman Antitrust Act and that the Congress has expressed continuing concern over proper functioning of those markets.

Following the Civil War, farmers and ranchers began to express their political and economic discontent with railroad rates, upon which their economic livelihood depended, and with monopolistic practices by grain warehouses, packers and other large purchasers of agricultural products. Eventually, these agricultural producers, and others, formed what is known as the Granger Movement to combat growing monopolistic practices which adversely affected farmers and impaired competitive conditions in markets for agricultural products. See R. Hofstadter, The Age of Reform 164 (Random House 1955); S. Buck, The Granger Movement 26 (1913).

The legislative history behind the federal antitrust laws made it clear that the vulnerability of farmers and ranchers was foremost in the minds of Congressional figures as they enacted the Sherman Antitrust Act in 1890. Commodity prices were being depressed at the whim of large grain companies, elevators, and packers, while retail and consumer prices for these commodities were relatively high.

The various exemptions from the operation of the antitrust laws also suggest significant congressional concern that agricultural markets would remain competitive and that agricultural producers would remain vital. The Capper-Volstead Act exempts many qualifying agricultural producers from the reach of the Sherman and Clayton Antitrust Acts except where they engage in proscribed predatory behavior. See Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980), cert. denied, 454 U.S. 818 (1981). While not dispositive, these forms of exemptive treatment indicate ongoing Congressional concern over the proper functioning of agricultural markets and the health of agricultural producers. The passage of Senate Bill 2835 would be another concrete expression of that interest to maintain a healty agricultural sector.

III. Conditions in Agricultural Markets Require Some Form of Control Over Anticompetitive Conduct

The thrust of S.2835 seeks to provide a method of self-protection to agricultural producers. The Bill is made imperative not only by the Supreme Court's decision in Illinois Brick, but also by trends and directions in markets for agricultural products. In a nutshell, many such markets are showing alarming rates of growth in buyer concentration. These growth rates alone are reason for concern, but usually the increases in industry concentration are accomplished by anticompetitive behavior such as mergers, price-fixing and other collusive conduct undertaken for predatory reasons.

The recent experience in the beef industry is illustrative of the directions currently under way in other agricultural markets. In a June 1984 report to the Committee on Small Business of the House of Representatives, the Staff's chief economist reported that "the trend toward fewer firms in the steer and heifer slaughter industry, . . . is continuing at an accelerated pace . . . If the current trends continue unchecked, by 1995 there will be only 8 firms left in the industry." Documentary evidence presented in that report show that the 8 largest slaughtering firms had a market share of about 61% in 1982, and this represented a significant increase over 8 firm concentration rates in 1970.

But, more significantly for purposes of this proposed legislation, this trend toward greater concentration is occuring in other related markets for agricultural products. The true significance of heavy industry concentration, such as in the grain and beef industries, can be observed only when surveying the market conduct of the oligopolies operating in Mose Markets. The chief result of increased concentration is greater industry reliance on explicit and tacit collusion and price fixing. In 1980, ten firms accounted for 63% of the steer and heifer slaughter market throughout the United States. These ten firms slaughtered 25% of the cows and bulls, 57% of the calves and 58% of the hogs in the U.S. market. Thus a handful of firms are responsible for the majority of red meat produced in America. These data confirm the trend toward increasing concentration of economic power uncovered by the Small Business Committee studies and hearings by the House of Representatives in 1979 and 1980, and updated in the above-mentioned report. Most striking is the concentration of power in the boxed beef segment of the industry, which accounted for 49% of the 1980 steer and heifer slaughter and represents the major flow of fresh beef to retail groceries. In this mainstream the top four firms controlled 61% of the 1980 production, while the top 10 firms controlled 81 percent. Thus, decisions about how much meat to supply to the American public, what prices to charge, and what quality to strive for now realistically rests with a relatively small number of firms. Economic analysis has shown that at the retail level, the direct impact of increasing concentration among steer and heifer slaughters has raised the average retail beef prices by 25.1 cents per pound over the period 1969 to 1978, or 30 percent of the total retail beef price increase during the period. There is also evidence that trends toward concentraion in retail grocery markets ae increaseing and these trends protend ill for both consumrs and agricultural community procedures. See, United States v. Von's Grocery Co., 384 U.S. 270 (1966).

IV. The Adverse and Inequitable Impact of *Illinois Brick* on Agricultural Product Producers

The Court's decision in *Illinois Brick*, that indirect buyers of products cannot maintain an antitrust action for overcharges where proof of tracing damage is complex and there are serious risks of double recovery, has not been formably received. *See*, Cavanagh, *The Illinois Brick Dilemma: Is There a Legislative Solution?* 48 Alb. L. Rev. 273, 274 (1984). The rule in that case has generated a number of exemptions from the rule as parties and courts have attempted to maintain the deterrence and compensatory objections of the antitrust laws while complying with the Supreme Court's decision. For the most part, these exceptions have not been availing to agricultural product producers seeking to vindicate rights under the antitrust laws.

The courts have recognized exceptions where a distant manufacturer or supplier is in a vertical conspiracy with a middleman[2], where the defendants purchase under pre-existing cost-plus contracts[3], where the direct purchaser is a division of a subsidiary of a co-conspirator[4], and where the defendants created an "umbrella" under which their competitiors, with whom the plaintiffs dealt, were able to charge higher prices than without the defendant's price fixing in the relevant market.[5] However, with great consistency, agricultural product producers have been unable to fall within these exceptions to the *Illinois Birch* rule. *See*, *e.g.*, *Zinser v. Continental Grain Co.*, 660 F.2d 754 (10th Cir. 1981); *In re Midwest Milk Monopolization Litigation*, 529 F. Supp. 1326 (W.D. Mo. 1982).

The availability of these exceptions to the *Illinois Brick* rule, and the seeming unavailability of these exceptions to the progress of antitrust cases involving agricultural products, suggests not only the dissatisfaction with the *Illinois Brick* rule but also the relative inequity of foreclosing judicial access to agricultural producers. These cases necessarily involve allegations of industry-wide anticompetitive conduct and the courts have invoked the *Illinois Brick* rule because of concerns over litigation complexity. Senate Bill 2835 would permit the maintenance of these important lawsuits, subject to the limits discussed in the next section, and would help foster greater competition in agricultural product markets.

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[2] *See* *Fontana Aviation v. Cessna Aircraft Co.*, 1980-1 Trade Cas. (CCH) ¶63, 230 (7th Cir. 1980)

[3] *See* *In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation*, 1980-2 Trade Cas. (CCH) ¶63, 492 (C.D. Calif. 1980)

[4] *Royal Printing Co. v. Kimberely-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980)

[5] *Midwest Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (2d Cir. 1979)

V. S.2835 Avoids Many of the Legitimate Concerns Underlying the Rule In Illinois Brick

Senate Bill 2835 addresses two problems: First, it is intended to reassert the original intent and purpose behind much of the federal antitrust statutes and insure their harmonious relationship to the agricultural sector. Secondly, the intention of this Bill is not only to provide agricultural producers with the ability to recover damages but also to limit that recovery so that any potential defendant will not unduly suffer under the antitrust treble damage provisions providing that the defendant's same conduct has been subject to previous antitrust litigation in which damages were awarded.

The major thrust of S.2835 is to reassert the right of sellers who actually grow grain or raise livestock, to sue for damages under the Sherman Act, persons above them in the chain of distribution who fix an artificially low price for the commodity, or monopolize markets for that commodity, irrespective of whether the price fixer bought directly from the producer. Producers of these grains and livestock are defined as those persons who have possessed the grain-producing plants or raised and fed the livestock for more than 21 days previous to sale. These farmers, ranchers, and feeders, who often have contributed a large, long-term investment in land, plant, equipment and inventory needed to produce the commodity, are quite vulnerable to "upstream" price-fixing activities because of the long lead times between the decisions to raise the commodity and the time of the sale. Further, these persons are generally in no position to forebere from selling, in spite of low prices, because of the perishable nature of the produce, the expense of long-term storage and the short-term need for cash in the agricultural sector to sustain their capital-intensive businesses. Contrary to the position of the purchaser of priced fixed goods, who can exercise the election not to buy, these agricultural producers face a "no-win" situation which offers no choice but to sell into a fixed market.

Short-term holders of these commodities or middlemen processors are not in the same category, either because they are generally part of the mechanism that passes the price "undercharges" down to the producer or because they are less vulnerable to price swings due to the short-term nature of their investment. Further, middlemen processors are not vulnerable to the radical changes in production costs experienced by the primary producer. Finally, the middleman processor of agricultural commodities is more likely to experience close, long-term business relationships with "upstream" price-fixers. This occurrence makes the chances substantially unlikely that middlemen would sue for damages caused by price-fixing. In fact, in recent cases brought by producers against "upstream" price-fixers, the middleman has consistently chosen not to sue. Therefore, there is the need for the private antitrust actions to continue to police the agricultural marketplace. In fact, Assistant Attorney General John Shenefield has testified in prior hearings that many times direct purchasers will not sue simply because it jeopardizes critical supply relationships and in those cases, the individual parties are the only real plaintiffs to challenge. Hearings on Antitrust Enforcement Act of 1979, S. 300, Serial No. 96-2, p. 13. Shenefield also stated that as corporate decisions depend on the net dollar and cent resolution of any particular problem, the treble damages available in private antitrust litigation serve as a much more effective deterrent than criminal sanctions that may be imposed. Id. at p. 12. Further, as the Congressional intent throughout the history of the antitrust laws has been based on the objectives to (1) compensate those truly injured and (2) act as a strong deterrent to commissions of such violations in the future, it is clear that there is the need for the legislative repeal of Illinois Brick.

Among the primary objections raised against such legislation are the following alleged problems:

1. The problem of increased litigation that would result if agricultural producers/"indirect sellers" were allowed to sue for violations of the antitrust laws and the assertion that the addition of the agricultural producers/"indirect sellers" as plaintiffs would intensify the already complex litigation in the antitrust arena;
2. The problem of the potential duplicative recovery and aggregate damages that might be assessed against the antitrust defendant;
3. The problem of tracing the injury back to the indirect seller and proving the amount of damages actually sustained; and
4. The problem alleged that most indirect parties do not claim their shares of recovery via antitrust actions.

In response to the first objection noted above, it is sufficient to say that the mere possibility of increased litigation and the increased complexity of litigation due to the pursuit of recognized legal remedies by injured parties should not serve as a basis for denying their recovery. Congressional intent has clearly been to provide parties injured by antitrust violations with a forum in which to recover their damages. In fact, Congress' legislation, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, was adopted to provide indirect parties with an effective and efficient "mechanism to permit them to recover damages by giving State attorneys a general cause of action [to sue as parens patriae on behalf of the States' citizens] against antitrust violators." S. Rep. No. 94-803, p. 6 (1976) [cited in Illinois Brick Co. v. Illinois, 431 U.S. 720, 756 (1977) (Brennan, J. dissenting).] Another Congressional objective provides support for the indirect party suit in that such suits play a paramount role as everpresent threats to deter "persons" contemplating business behavior in violation of antitrust laws. Id. at 755, citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 20 L.Ed. 2d 982, 88 S. Ct. 1961 (1968).

As for the problem of potential duplicative recovery and aggregate damages being assessed against the antitrust defendant, the proposed legislation acts itself to dispell this justifiable concern. The bill provides that an agricultural producer's (plaintiff) recovery shall be limited to actual damages attributable to overcharges or underpayments where the plaintiff's recovery duplicates damages awarded as part of a final judgment in a prior antitrust action based upon the same conduct of the same defendants. The burden is on the defendant to show by clear and convincing proof that the duplicative damages have been awarded and that those damages relate to precisely the same transactions which are at issue in the subsequent case. The burden should not be on the plaintiff to show the absence of such a duplicative recovery and the defendant should not be deemed to have carried its burden unless it shows with specificity that it has already paid damages as to those particular goods or transactions which are at issue in the subsequent case.

In reviewing that proof offered by the defendant, the court should give a great deal of consideration to the judgment to ensure that the recovery of damages in the previous action is not a sham or a contrivance to avoid treble damage recovery.

If there has been no prior judgment meeting the aforementioned criteria, then the plaintiff producer would be permitted the normal treble damage recovery as provided in the Clayton Act. Clearly, the intent and effect of S.2835, to permit recovery by certain agricultural producers but also to avoid the onerous nature of a duplicative treble recovery, should satisfy any objection raised on the matter of duplicative recovery.

The third objection, that there will be difficulty in tracing the injury back to the agricultural producer seller and proving the amount of damages actually sustained, is contrary to the established case law. "Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of plaintiff's rights." Illinois Brick Co. v. Illinois, 431 U.S. at 756 (Brennan, J., dissenting), citing Bigelow v. RKO Radio Pictures, 327 U.s. 251, 265-66 (1946); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131 (1969); Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968); and Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961). These cases emphasized that to plead a cause of action under section 4, "allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all that law requires." Additionally, it can be noted that it is not impossible to trace the price cuts from the retailers and grain companies, through the middlemen to the agricultural producers of livestock and grain. Once the plaintiff has established his injury and the source of such injury, he clearly should not be denied recovery.

The final objection raised by the opponents of prior legislative attempts to reverse the effect of Illinois Brick and Hanover Shoe rests on the assertion that most indirect parties do not claim their shares of recovery through antitrust actions. This objection suggests that the middlemen/direct purchasers (or the grain elevators and packers in the conventional distribution chain in agricultural products industry) would be the party most capable and interested in bringing the action against the antitrust violator. Both reasons for this objection are unfounded.

First of all, the assertion that most indirect parties do not seek to recover their share of damages in antitrust actions may be factually correct, but it fails to address the reasons for such lack of involvement. The very fact that antitrust violations have occurred serve as an explanation for the lack of involvement. Insufficient market information to the agricultural producer results from the withholding of such information by the organizations and parties (and arguably unlawful combinations which act to depress agricultural product prices to the producers) from the agricultural producers/"indirect sellers". It seems obvious that a party would not entertain the thought of bringing a legal action if there is no information available to the party of the basis for the potential claim. Also, according to former Assistant Attorney General, John Shenefield, the decision in Illinois Brick has had a recognized chilling effect on the indirect party antitrust suits. Statement by John Shenefield, Assistant Attorney General, Hearings Report on Antitrust Enforcement Act of 1979, S. 300, Serial No. 96-2, pp. 12, 24-27. Shenefield stated that nearly 50% of antitrust enforcement may have been wiped out by Illinois Brick and the indirect parties may have been scared away by Illinois Brick.

The assertion that the middlemen, the grain elevators and packers, are the parties best suited to sue for antitrust violations, such as price fixing, is equally suspect. First of all, there is no argument that the indirect parties are not injured by price fixing and conspiracies to depress prices to the agricultural producers. Therefore, once the injury is shown, an is causally connected to the antitrust violation, there should be no doubt that the indirect party has a legitimate claim and the indirect party should not be precluded from seeking redress merely because a direct party is also involved, particularly in the situation where the direct party has acted in concert with the antitrust violator. The historical reading and effect of the Illinois Brick and Hanover Shoe denial of the "pass-on" theory results in such preclusion. It would seem that the holdings in both Hanover Shoe and Illinois Brick were intended to be applied in the limited contexts in which they were rendered, i.e., suits to recover damages for antitrust violations in which the pass-on theory is asserted as a defense or offense in the case, and the indirect party and the direct party are not parties to the same action. Illinois

Brick at 753 (Brennan, J., dissenting). If the holdings are limited in that context, then indirect parties would still have the access to the court necessary to redress their injuries; of course, this would perhaps place the burden of joinder on the indirect party, but such would generally not be an undue burden since they are fully aware of the direct party involved.

Finally, there is little support for the statement that the direct party is the only party to pursue the legal remedies attendant to damages suffered at the hand of antitrust violators. If the opponents of this legislation contend that the indirect party has little incentive to sue, what incentive can be shown by the middleman who has passed on the damaged (decreased prices) or has acted in collusion with the antitrust violator/price fixer. In fact, the direct party may often be intimidated by a well-founded fear of economic reprisal by the powerful price fixer, such as jeopardizing their position with suppliers and/or losing their position in the distribution chain from price fixer to agricultural producer.

Obviously, intimidation practices exercised by the antitrust violator would clearly decrease the incentive that any direct party may have in bringing an antitrust action, and as such, it is not always the case that the direct party would have the best and most compelling reason to sue the antitrust violator.

CONCLUSION

Senate Bill 2835 addresses problems faced by producers of agricultural products and the ruling of the Supreme Court of the United States in Illinois Brick. Traditional antitrust laws have focused on price fixing and rigging of markets by sellers of goods. The situation to which this legislation is directed is the converse: a situation where there are products being sold into a fixed market. Under the antitrust laws as they exist, a plaintiff may recover his "overcharges" paid directly to a person who participates in a conspiracy to fix, stabilize or maintain prices. Under the holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), recovery is limited to those persons who are "direct purchasers" from conspirators.

The policy announced in Illinois Brick was decided to limit the complexities of proof which subsequently resulted from the suit by persons downstream in the chain of distributors. The theory was that part of an artificially high price could be absorbed upstream of an indirect purchaser by middlemen and that the difficulty of proof in such cases was burdensome to the administration of justice. The complexity outweighed the indirect purchaser's right to maintain an action.

With agricultural products, however, the converse of the usual antitrust circumstances exist. Instead of a few sellers and many buyers, there are literally hundreds of thousands of sellers and relatively few buyers. Instead of "overcharges" in the chain of distribution, there exists a rigged marked into which these hundreds of thousands of producers must sell at an artificially low price. An instead of conspirators receiving a "windfall" as a result of their illegal and conspiratorial activities, they merely reduce their variable costs. The effect of the conspiracy is in the market into which the products sell. Contrary to circumstances involving "overcharges", there is no apportionment problem because no "overcharge" has been paid. A "pass-on" defense in the context of a rigged market for agricultural products is a nonseuitur because such a defense would require allocation of unpaid amounts.

The problem addressed by the Supreme Court in Illinois Brick is one of tracing the overcharge to and the overpayment by a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damage suffered by reason of the payment of artificially high price might be absorbed by the payor. In the case of agricultural products sold at a conspiratorially depressed price, the producer can neither recoup nor pass on any loss suffered because he is the first seller into the rigged markef. Likewise, it is not realistic to assert that a middleman might have absorbed some of the price depression. In some cases middlemen are the victims of the enormous market sources wielded by the conspirators. In any event, it is naive to think that a profit-minded middleman would attempt to counteract the effect of the conspiracy by raising his costs and paying higher prices than are established by the rigged market.

It is precisely because of the fact that the marketing of agricultural products involves the sale by many to a few that Illinois Brick, and the problem addressed in that case, are not appropriately applied to the sale of agricultural products and it is the intent of this legislation to encourage the vigorous enforcement of antitrust laws as is appropriate according to the legislative intent and judicial interpretation of the Clayton Act.

Senator **Grassley**. Dr. Mueller?

Dr. **Mueller**. Thank you, Mr. Chairman.

It is a pleasure to be invited to appear before this committee. My comments are going to reflect research that has been done at the University of Wisconsin and other North Central land grant universities, that I think has a bearing on this particular piece of legislation.

The essence of my support for S. 2835 is that *Illinois Brick* unfairly affects agricultural producers because it ignores dramtic differences in the competitive structures in the food industry. It also is unfair because the policies motivating *Illinois Brick* are not of overriding significance, given alternative ways of satisfying these concerns, and when compared with the cost to producers of not being able to sue for damages.

Farm income is often further adversely affected by the competitive environment in which farmers operate. It is generally acknowledged that agriculture is the only large segment of the economy that is perfectly competitively structured. This means that producers have no control over the prices they pay for supplies or receive for their products.

In contrast to agricultural production, industries involved in processing and distributing food products often have many aspects of market power. Food processing industries are more concentrated than are all manufacturing industries. Moreover, whereas the average of all manufacturing industries is becoming less concentrated—in other words, many sectors of the economy are becoming increasingly competitive—the food processing and distributing industries are becoming more concentrated. And, whereas there are still about 19,000 food manufacturing companies, a mere 100 of these control over 75 percent of the assets of all corporations engaged in food manufacturing. These competitive characteristics of the food processing and distributing industries take a heavy toll from farmers and consumers. Researchers estimate that the market power of food processors, as a group, enables them to increase their gross margins between $10 and $15 billion annually. And, like food manufacturing, food wholesaling and retailing has experienced a persistent upward trend in concentration, and with similar results: Prices and profits are significantly higher in concentrated retail markets than in competitively structured ones.

If the input and output sectors of agribusiness were structured like agriculture is, I would not be here today. Farmers would never be overcharged on the supplies they purchase or underpaid for the commodities they sell.

My brief review of the structure of the food manufacturing and distribution industries indicates farmers sell their products in a largely oligopolistic procurement-processing-distributing system. Even in the absence of antitrust violations, such as price-fixing agreements, these characteristics tend to depress farmers' prices.

It is these developments, I think, that make this bill especially important. The high market concentration of these industries and the growing concentration of these industries make them especially prone to collusive behavior and other kinds of antitrust violations. This is borne out by antitrust enforcement patterns. During the 1960's and 1970's, the Federal antitrust agencies spent about 25 percent of their resources on the U.S. food system because of these characteristics.

The antitrust actions brought by the Government through the years have covered a broad area of these industries.

So, given the market structures in these industries and the historic evidence on antitrust violations, I conclude that as a matter of public policy, we must take seriously the threat that various downstream, anticompetitive tactics can result in farmers being underpaid for their production.

Federal antitrust might reduce some of this threat. The evidence indicates, however, that Federal antitrust enforcement in the food system has fallen off considerably in recent years. This leaves private antitrust as a major source of protection against these problems.

But *Illinois Brick* denies farmers the opportunity to maintain private damages against all but first handlers of their products. This bill would give them the right to protect themselves. It would give them the right to sue for treble damages in the products involved, even if they were indirect purchasers.

The objective underlying the Clayton section 4 authorization for private damages includes enforcement of the antitrust laws, deterrence of anticompetitive conduct, and deprivation of fruits obtained through unlawful conduct. The major objections to overruling *Illinois Brick* are that this would frustrate the section 4 objectives by diminishing deterrence, by increasing the potential for multiple liability, and by complicating damage measurements.

I will only summarize my views with respect to each of those important points, which I discuss in greater detail in my prepared statement.

First, as to the deterrence issue, I think, as I discuss in my prepared statement, there are special reasons present which make it unlikely that we get adequate protection in terms of private antitrust enforcement if we rely on only direct purchasers or direct suppliers of antitrust violators.

The characteristics that make this a problem in all industries are not true in the case of farmers. They do not have the kinds of characteristics that make them not have an incentive to bring an antitrust case.

As to the multiple liability issue, I think this subject has been covered many times before, and it is clear, I think, that there are adequate safeguards. But insofar as this is at all a problem, I think this particular bill has provided an additional procedural mechanisms for reducing the likelihood of this problem arising.

This leaves us with the question of added complexity in calculating damages. The *Illinois Brick* rule clearly simplifies the calculation of damages by never making it necessary to trace through who has been affected. I think this is a question of whether justice should be sacrificed in the name of simplicity. Although there are some situations where this kind of a tradeoff can and probably should be made, I do not believe that it should or need be in the case of agricultural products covered by this bill, especially since the deterrence and multiple liabilities are dealt with satisfactorily.

In *Illinois Brick,* the Court said that it was often difficult to trace through the effects of an overcharge on several different levels of a manufacturing/distribution chain. And there is no question but there are situations in which this is true. But, based on my personal experience in antitrust cases involving treble damage calculations and in studying the kinds of practices that were used in various cases, it is often quite easy to follow through the price effects on the various distribution levels. The important point, though, is that this is a question of fact. It is not just a matter that you can generalize about.

The Court's majority in *Illinois Brick,* in fact, recognized that there are certain situations in which the measurement process is manageable, but the Court did not want to carve out specific areas. Thus, this particular piece of legislation would do what the Court was unwilling to do.

This necessarily raises the question in everyone's mind, including my own, that in enacting this sort of special legislation for a segment of the economy, the question is why should it be singled out. As I demonstrated earlier, there is a special case to be made because of the differences in the structure of agriculture and other industries. But the other point that I think is equally, or perhaps more important, is that the kind of measurement problems that plague the question of tracing through damages are less of a problem, in my view, in the industries covered by this particular bill than is generally the case.

Damage authorities have identified the kinds of evidence one looks at, the kinds of industry characteristics that one looks at, in deciding whether a passthrough is likely to occur and so on. I mention several of those on page 10 of my testimony, and the important point I am making here is that there are characteristics in these industries that make it possible to measure the way in which damages flow through the system. Especially important in the case of agricultural products is that in the short-run, and certainly up to 2 years, the supply of a product is very inelastic, which means in simple textbook theory, that if you get a price depressed somewhere down the distribution chain, that price is going to be passed back entirely, or almost entirely, to the raw product producer. And this means that in many, many situations, there can be no real question but that the market is going to pass back the lower price to farmers. We see this in practically every industry where, when there is a change in demand, the price drops at the retailer level, and it follows down through the chain. So likewise, if there is a depressing effect because of a price fix at the retail level or at some subsequent level, this is going to be passed back to farmers. And there are other characteristics that make it so.

So, there are, actually, a fairly impressive list of characteristics in agriculture which those authorities who have identified relevant factors would agree as being ones which would justify making an exception for the industries covered by this bill. I am not saying they are the only area, by any means. There may be industries where it can be done even more easily. The point is, it is a relatively simple process in these industries.

So, in sum, I believe the bill would help farmers and ranchers often obtain fairer treatment under the law, while at the same time, increasing the deterrent effect of private antitrust enforcement in the food system. These results can be accomplished without the threats of multiple liability and excessively complex legal proceedings.

Thank you.

[The following was received for the record:]

STATEMENT

OF

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OF AGRICULTURAL ECONOMICS,
ECONOMICS AND LAW
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CONCERNING

S. 2835, A BILL TO AMEND THE
CLAYTON ACT TO ALLOW CERTAIN SELLERS
OF AGRICULTURAL PRODUCTS TO BRING
ANTITRUST ACTIONS

SEPTEMBER 24, 1984

Mr. Chairman and members of the Committee. It is a pleasure and honor to be invited to appear before this Committee to testify on S. 2835. I favor enactment of this bill which would amend the Clayton Act to allow producers of certain agricultural products to maintain antitrust actions against downstream indirect buyers of their commodities. This amendment responds to the Supreme Court's decision in Illinois Brick.[1/] That decision prevents plaintiffs from establishing injury when that injury has been passed on to them as a result of an alleged antitrust violation. In the present context it means that farmers and ranchers do not have standing to sue for damages if their damages have been passed back to them as a result of, say, a price fixing conspiracy among food distributors.[2/] I maintain that Illinois Brick unfairly affects agricultural producers because it ignores dramatically different competitive structures in the food system. It is also unfair because the policies motivating Illinois Brick are not of overriding significance given alternative ways of satisfying these concerns and when compared with the costs to producers of not being able to sue for damages.

Market Structures and Antitrust in the Food System

These are difficult times for many farmers and ranchers. High interest rates, an overvalued dollar, and farmers' inherent inability to adjust rapidly their supply to current demand conditions all combine to depress farm income.

Farm income is often further adversely affected by the competitive environment in which farmers operate. It is generally acknowledged that agriculture is the only large segment of the economy that is perfectly competitively structured. This means that producers have no control over the prices they pay for their supplies or receive for their products. If the input supply and output processing sectors of agribusiness were similarly competitive, farmers would never be overcharged in buying supplies or underpaid in selling their raw products. But the farmer lives in a different world.

In contrast to agricultural production, however, industries involved in processing and distributing food products are imperfectly structured. Food processing industries are more concentrated than is the average for all manufacturing industries. Moreover, whereas the average level of market concentration in all manufacturing industries has not risen appreciably since World War II (Table 1), concentration in food manufacturing industries has increased persistently and substantially since 1947 (Tables 2-4). Whereas today there are 19,000 corporations engaged in food manufacturing, a mere 100 control over 75 percent of all assets of food manufacturing firms (Table 5). These corporations are huge conglomerates that occupy leading positions in numerous food and non-food products (Table 6). These competitive characteristics take a large toll from farmers and consumers. Researchers estimate that the market power of food processors, as a group, enables them to increase their margins between $10 billion and $15 billion (1975 dollars) annually.3/ Like food manufacturing, food wholesaling and retailing has experienced a persistent upward trend in concentration.4/ And with similar results: prices and profits are significantly higher in concentrated retail markets than in competitively structured ones.5/

If the input and output sectors of agribusiness were structured similarly to agricultural production, I would not be here today. Farmers would never be overcharged on the supplies they purchase or underpaid for the commodities they produce. But this is not the case. As my brief review of the structure of food manufacturing and distribution indicates, farmers sell their products in a largely oligopolistic procurement-processing-distribution system. Even in the absence of antitrust violations such as price fixing agreements depressing farm receipts, farmers often do not get a fair shake in the marketplace.

These developments have significant implications for S. 2835. Their high market concentration makes the food processing and distributing industries especially prone to collusive behavior and other antitrust violations. This is borne out by antitrust enforcement patterns. During the 1960s and 1970s the antitrust agencies devoted roughly 25 percent of their resources to cases in the food industries. The 896 cases brought by the federal agencies during 1950-1984 ranged over many sectors of these industries and charged numerous antitrust violations (Tables 7 and 8).

Given the concentrated market structures in food manufacturing and distribution and the historic evidence of antitrust violations, I conclude that as a matter of public policy we must take seriously the threat that various downstream anticompetitive tactics can result in farmers being underpaid for their production. Federal antitrust might reduce some of this threat. The evidence indicates, however, that federal antitrust enforcement in the food system has fallen off considerably in recent years (Table 7). Private enforcement is the remaining protection available to agricultural producers. But Illinois Brick denies farmers the opportunity to maintain private damage actions against all but first handlers of farm products.

Senate Bill 2835 would give agricultural producers the right to protect themselves. It provides that actions taken to recover "damages resulting from any underpayment received on the sale of cattle, hogs, sheep, grains, or soybeans shall not be barred solely because the person seeking such damages did not sell such products directly to the defendant ..." This language would permit farmers to bring treble damage actions against anyone in the procurement-distribution chain who reduced farm prices as a result of violating the antitrust laws.

The objectives underlying the Clayton Section 4 authorization for private damage actions include enforcement of the antitrust laws, deterrence of anticompetitive conduct, and deprivation of fruits obtained through unlawful conduct. The main objections to overruling Illinois Brick are that this would frustrate the section 4 objectives by diminishing deterrence, by increasing the potential for multiple liability, and by complicating damage measurements. I shall address each of these concerns in turn, showing that they are not of compelling significance when applied to agricultural industries.

The Deterrent Effect of Permitting Farmers to Act as Private Attorneys General

American antitrust policy has long depended on private parties to enforce the antitrust laws. This is reflected in the large numbers of private actions brought annually. During the 1970s, private parties brought an average of 1,300 cases per year compared to an average of only 53 cases brought by the two federal antitrust agencies.[6] Congress has encouraged private parties to act as private attorneys general by providing that those injured by antitrust violations be awarded treble the damages actually incurred. Another reason for trebling damages was to deter future violations by imposing penalties exceeding the benefits received by law violators.

In Illinois Brick, the Supreme Court reasoned that the deterrent effect of private enforcement would be greatest if only those parties directly affected by an antitrust violation were permitted to sue for treble damages. Landes and Posner are among the most ardent proponents of the view that the Illinois Brick rule maximizes the deterrent value of private actions. Their analysis leads them to conclude that

> allowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement. The basis for this conclusion lies in the detrimental impact that allowing a passing-on defense would have on enforcement by direct purchasers.[7]

This conclusion follows from their belief that direct purchasers are the most efficient enforcers of the antitrust laws; that permitting indirect purchasers to sue reduces everyone's incentive to sue; and that by dividing the damages among parties diminishes everyone's incentive to sue.

Whether the Landes and Posner argument is valid is an empirical matter. While the evidence for some industries may support the Landes-Posner claims, I do not believe this is true in the food industries. The main defect in their argument is that they ignore the fact that many private parties are reluctant to sue an antitrust violator.[8] Based on my study of the food industries, I believe this is an especially serious factor in these industries. The following situations come to mind.

1. Often, agribusiness firms have established long-term, ongoing business relationships that discourage legal actions on any kind.

2. Many food processors face powerful wholesale and retail buyers upon whom they depend for shelf space.[9] In these circumstances a processor would be reluctant to offend a potential buyer because doing so could affect relations in the future.

3. When large food manufacturing and distributing conglomerates meet one another in competitive or buyer-seller relationships in many markets they are inclined to engage in a reciprocal exchange of favors leading to a live and let live attitude in all their relations.[10]

4. In some circumstances the affected party may himself be engaged in an independent violation of the law and would be unwilling to expose himself to broad civil discovery.

5. Some affected businesses may be disinclined to bring an antitrust action because by passing back the lower price to farmers, they have not actually been injured.

The presence of any one of the above factors in the processor-distribution chain will result in less than optimum private antitrust enforcement.

Significantly, farmers and ranchers do not have the above reasons for failing to bring a private damage action. In fact, in a recent article that characterizes the role of the private attorney general as increasing the penalty associated with violating the antitrust laws but rarely increasing detection of such violations, three of the five exceptions cited to this phenomenon involved the food industry. Two of those suits were initiated by producers.[11] Moreover, the prevalence of farmer associations and trade groups might provide an effective vehicle for more concerted investigations into possible antitrust violations than is now the common practice in most industries. Thus, reestablishing the right of agricultural producers to sue indirect buyers promises more, not less, effective enforcement of the antitrust laws. Both consumers and farmers would benefit from greater activity.

Multiple Liability

With respect to multiple liability, Justice Brennan's dissent in Illinois Brick points out that this problem will arise only when suits by direct and indirect purchasers are pending in different courts at the same time or when additional suits are filed after an award of damages resulting from the same violation has already been granted.[12]

In the case of simultaneously pending suits, a number of procedural mechanisms exist to reduce the prospect of multiple liability. When several different actions are pending in different courts against the same defendant, judges may transfer them to a single district, or coordinate their pretrial proceedings. Also, the Judicial Panel on Multidistrict Litigation can transfer cases to a single district for coordinated pretrial proceedings, and then cases may be transferred to and consolidated in the same district for trial.[13]

Other procedural provisions that can be utilized to bring the adjudication of all parties' rights into a single trial include compulsory joinder, intervention of right, and permissive intervention. If there are potential plaintiffs who have not asserted their claims, defendants can ensure that all potential plaintiffs litigate their claims inter se by utilizing statutory interpleader provisions. Once cases are consolidated, damages may be allocated among the parties.[14/] When direct and indirect purchasers have presented their claims before a single court a bifurcated approach (in which the question of whether there is an antitrust violation is litigated separately from the amount of damages incurred by plaintiffs) can and has been used.[15/]

When the case involves a class action suit, defendants can bar claimants from bringing independent suits if they have not filed timely requests for exclusion from the class. Given the usual duration of antitrust litigation and the four year statute of limitations for private antitrust actions, it is not likely that there will be many, if any, prospective plaintiffs who would wait until previous cases are finished before filing a suit.[16/]

Multiple liability theoretically might arise if defendants settle a suit to avoid further litigation. To prevent the prospect of multiple recovery by new parties initiating a suit, courts may postpone judgment until the statute of limitations has expired or require that judgments be kept in an interest-bearing escrow account until the statute of limitations has expired. Similarly, courts could require that the original claimant post bond to meet any future actions by indirect purchasers until the statute of limitations has expired.[17/]

Despite the availability in Illinois Brick of these various procedural devices, the Supreme Court felt that the risk of multiple liability was unacceptable. It is interesting that between 1968, the year of Hanover Shoe, and 1977, when Illinois Brick was decided, there was not a reported case in which the defendant claimed to have suffered multiple liability. This is not surprising in light of the various procedural mechanisms that had become available as a result of the electrical conspiracy cases[18/] and the desire and ability of the courts to utilize these procedures to protect defendants.

If there is any doubt that existing procedural mechanisms might be inadequate, S. 2835 has the added safeguard of precluding the recovery "for any amount of underpayment that has been passed on to other persons, who themselves are entitled to recover damages...." In conjunction with existing procedural rules, this should be more than adequate to prevent the already rare possibility of multiple liability.

Added Complexity in Calculating Damages

There can be no dispute that the Illinois Brick rule simplifies the calculation of damages. A relevant question is whether justice should be sacrificed on the altar of simplicity. Although there are situations where such a trade-off may be justified, I do not believe it should or need be in the agricultural products covered by S. 2835, especially if the deterrence and multiple liability issues are dealt with satisfactorily as explained above.

The Court believed in Illinois Brick that it often was very difficult if not impossible to trace through the effects of an overcharge on several different levels in the manufacturer-retailer-consumer distribution network. Economists have developed the relevant theory to make the necessary calculations.[19/] And based on my personal experience it often is quite easy to determine when a price overcharge has been passed on.[20/] Even the Court's majority recognized that there are certain situations in which the measurement process is manageable, and some segments of the agricultural economy appear~~s~~ to exemplify the examples cited.[21/] The Court was reluctant, however, to carve out exceptions for industries based on their manageability. Adoption of S. 2835 would settle this problem by designating particular agricultural industries. In enacting such legislation the Congress can be assured that it is identifying for special treatment products that lend themselves to practical analysis of pass on issues. Economists have shown that the ability of a direct purchaser to pass on an overcharge for a product depends on the relative elasticities of supply and demand[22/] as well as on the institutional procedures used in establishing transfer prices. Without going into the details of the economic models demonstrating the significance of supply and demand elasticities, suffice it to say that the damage allocation problem can become quite complex in some situations. Fortunately, however, economic theory suggests and business experience verifies that price reductions by downstream processors or distributors will be fully or largely passed back to farmers. When supply is highly inelastic, as is nearly always true of farm products in the short run, farmers receive all or practically all ~~the full impact~~ of downstream price reductions.[23/] Also, if an intermediary marketing industry is highly competitive, it will tend to pass back to farmers price decreases imposed on it.

Damage authorities have identified the factors that should be considered when estimating the rate of passing on. As we consider the application of several of these factors to agricultural products, it should be emphasized that, "In any specific case, one or more of these factors may be determinative in the sense that the outcome will be certain whatever the nature of the other factors."[24] Application of these factors to agricultural products indicates that they generally are sold under conditions that enable one to determine whether lower prices are passed back to farmers. Here I touch on several especially relevant factors.

Frequency of Price Changes. Passing on can be expected to occur most rapidly when intermediary industries experience frequent price changes. Clearly, agricultural prices change much more frequently than do most non-agricultural products.

Consistency of Pricing Practices. It is much easier to determine the pass on rate when businesses use a standard pricing formula. This condition is met, of course, in all agricultural industries using formula pricing procedures.

Directness of Costs. "The more the [undercharge] affects direct costs, the sooner the pass on will occur, and the higher the rate of passing on will be."[25] Since all agricultural products are direct costs of food processors and distributors we may always expect passing on to occur.

Industry Production Technology. The greater the uniformity of technology, the higher the probability that a monopoly undercharge will be passed on. Again, most agricultural marketing firms in an industry use common technology.

Industry Elasticity of Supply. "The less elastic the [supply] curve of the industry (of direct purchasers), the higher will be the rate of passing on. The fewer the readily available substitutes ... the less elastic [supply] will be."[26] As mentioned earlier, the supply of agricultural products generally are highly inelastic in the short run -- defined here as up to two years. I would expect that conspirators would be especially inclined to depress artificially farm prices during periods when agriculture is experiencing widespread depressed conditions; in such periods farm supply curves are more inelastic and remain so for longer periods of time because farmers have fewer alternative uses for their resources.

This is an impressive list of factors predisposing marketing intermediaries to pass back to farmers the lower prices paid to them by others. In the aggregate, they argue persuasively that farmers are likely to be victimized by price reductions caused by price fixers in the agricultural marketing system. These factors also assure that the food industries covered by S. 2835 would not involve complex litigation of the incidence of damages.[27] Failure to permit farmers to sue in these circumstances causes a grave injustice.

Consider the hypothetical example where grain elevators sell to traders who conspire to fix the purchase price of grain. I believe the elevator operators would simply pass back the lower prices to grain farmers. Under the *Illinois Brick* rule, however, only the grain elevator operators could sue for treble damages despite the fact that they were not damaged. The effect would be unjustly to enrich the elevator operators at the expense of farmers. Had farmers been permitted to sue they could have demonstrated quite readily that the elevator operators "passed back" the lower prices to farmers. The same situation also exists in the livestock industry when meat packers pass back to farmers the lower prices they are paid by their customers. Not only is the short-run supply of livestock very inelastic, but meat packers generally use the prices they receive for dressed meat at wholesale to determine the prices they pay for live animals.[28]

In sum, I believe S. 2835 would help farmers and ranchers obtain fair treatment under the law while at the same time increasing the deterrent effect of private antitrust enforcement in the food system. These results can be accomplished without the threats of multiple liability and excessively complex legal proceedings.

Footnotes

[1] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[2] See, *e.g.*, *Meat Price Investigators Ass'n v. Safeway Stores, Inc.*, No. 83-962, U.S. Sup. Ct. cert. denied, 2/21/84.

[3] Parker and Connor, "Estimates of Consumer Loss Due to Monopoly in the U.S. Food Manufacturing Industries," 61 *Am. J. Agri. Econ.*, 628-39 (1979).

[4] Marion, Mueller, Cotterill, Geithman and Schmelzer, *The Food Retailing Industry: Market Structure, Profits and Prices*, Praeger, 1979.

[5] *Id.* at 131.

[6] Clabault and Black, *Sherman Act Indictments*, 1955-1980, 1981 at 678.

[7] Landes and Posner, "Should Indirect Purchasers have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule in Illinois Brick," 46 *U. Chicago L. Rev.* 602, 604 (1979).

[8] See, *e.g.*, Cooper, "Effective Enforcement of the Antitrust Laws," Hearings before the Subcommittee on Monopolies and Commercial Law. House of Representatives, 95th Congress, September 9, 16 and 22, 1977.

[9] Hamm, "The Impact of Food Distribution Procurement Practices on Food System, Structure and Coordination," Working Paper #58, NC117, Studies in the Organization and Control of the U.S. Food System, University of Wisconsin, October 1981.

10/ Mueller, "Conglomerates: A Non-Industry," in Adams (ed.), *The Structure of American Industry*, 1982 at 464-68.

11/ Coffee, "Rescuing the Private Attorney General: Why the Model of the Lawyer as a Bounty Hunter is Not Working," 42 *Maryland L. Rev*. 215, 223, n. 18 (1983).

12/ *Illinois Brick* 431 U.S. at 762.

13/ *See* 1 Moore's Federal Practice Manual for Complex Litigation, Sections 5.20-5.40. It is interesting to note that the Multidistrict Litigation Act of 1968 28 U.S.C. Sect. 1407(1970) was adopted to facilitate the courts dealing with complex litigation after *Hanover Shoe*, the decision which initially cites this problem, was decided.

14/ See, *e.g.*, W. Va. v. Chas. Pfizer & Co., Inc., 440 F.2d 1079 (2d Cir. 1971).

15/ See, *e.g.*, Sugar Indus. Antitrust Litigation, 73 F.R.D. at 335.

16/ *Illinois Brick*, 431 U.S. at 764 (Brennen dissenting).

17/ McGuire, The Passing on Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe, 33 *University of Pittsburgh L. Rev*. 177, 198-99 (1971). And when a defendant has paid full recovery to an indirect purchaser, it might be possible to prevent new suits by the direct purchaser under the doctrine of collateral estoppel. *See* Blonder-Tungue Laboratories, Inc. v. Univ. of Ill., 402 U.S. 313 (1971).

18/ United States v. General Electric Co, 1977-2 Trade Cases (CCH) ¶ 72,717 (E.D. Pa 1977).

19/ Shaefer, "Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis," 16 *William and Mary Law Review*, 881, 934 (1975); and Harris and Sullivan, "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis," 128 *U. Pa. L. Rev*. 269 (1979).

20/ See *e.g.*, the affidavit of Willard F. Mueller as reported by the court in *Master Key Litigation*, 1973-2 Trade Cases at 94, 981.

21/ *Illinois Brick*, 431 U.S. at 734-44.

22/ See note 19 *supra*.

23/ Commentators also have found that price fixing is more likely to occur for a product with an inelastic demand. Schaefer, supra note 19 at 898.

24/ Harris and Sullivan, supra note 19, at 317.

25/ *Id*. at 318.

26/ *Id*. at 319. Here and elsewhere the references by Harris and Sullivan are to the character of demand rather than supply because their models apply to situations of passing on downstream toward consumers rather than passing back upstream toward farmers.

27/ The food industries, more than most others, demonstrate the wisdom of Harris and Sullivan's observation that "reasonable estimation of passing on which will closely approximate the truth in the majority of cases requires no mystical powers or elaborate, extensive economic analysis." *Id*. at 315.

28/ National Commission on Food Marketing, *Organization and Competition in the Livestock and Meat Industry* (Technical Study No. 1, June 1966); Clement E. Ward, *Slaughter-Cattle Pricing and Procurement Practices*, (Agricultural Information Bulletin No. 432, ESCS, U.S. Department of Agriculture, December 1979).

TABLE I

Table 1. Average Unweighted Four-Firm Concentration Ratios by Degree of Product Differentiation for 165 U.S. Manufacturing Industries, 1947-1977

			Consumer Goods: Degree of Differentiation			
	Total Industries a/ (165) (1)	Producer Goods (95) $\overline{A/S}$ = 0.1% b/ (2)	All (70) $\overline{A/S}$ = 2.3% b/ (3)	Low (21) $\overline{A/S}$ = 0.3% b/ (4)	Moderate (33) $\overline{A/S}$ = 1.6% b/ (5)	High (16) $\overline{A/S}$ = 6.4% b/ (6)
1977	42.3	42.1	42.5	27.6	42.3	62.4
1972	41.8	42.0	41.4	27.0	41.4	60.6
1967	41.1	42.1	39.7	25.2	39.2	59.9
1963	41.0	42.3	39.3	24.8	39.6	57.8
1958	39.8	42.3	36.3	22.7	36.7	53.4
1954	39.8	42.5	36.0	23.8	35.9	52.3
1947	40.4	43.8	35.7	26.0	36.2	47.7
Change 1947-1977	+1.9	-1.7	+6.8	+1.6	+6.1	+14.7

a/ These industries are all those manufacturing industries that had comparable data for the period 1947 to 1977.

b/ This is the average advertising-to-sales ratio for all industries in this group. This includes advertising expenditures for eight measured media in 1967.

SOURCE: Willard F. Mueller and Richard T. Rogers, "Changes in Market Concentration of Manufacturing Industries," Review of Industrial Organization, Spring 1984 at 3a.

TABLE 2

U.S. Manufacturing Companies, Census Years 1947–77.

	Number of Companies[a]		*Average Compounded Annual Change from Previous Year (percent)*	
Year	*Food*	*Rest of Manufacturing*	*Food*	*Rest of Manufacturing*
1947	42,469^E	183,482^E	—	—
1954	38,557^E	220,279^E	−1.37	+2.65
1958	36,545	232,961	−1.33	+1.41[b]
1963	32,617	252,530	−2.25	+1.63
1967	26,549	242,722	−4.84	−0.99
1972	22,172	245,254	−3.68	+0.21
1977	20,616	279,777	−1.44	+2.67
1947–77	—	—	−2.38	+1.42

Source: Connor (1982b).

E = Estimated.

— = Not available.

[a] From 1947 to 1963, the number of different legal entities (corporations, partnerships, proprietorships, cooperatives, trusts, and others) owning one or more plants in any one of 47 SIC food industries; companies with plants in two food industries are double counted. From 1967 on, the table shows the number of unduplicated companies. Duplication was 947, 1154, and 1416 in 1967, 1972, and 1977, respectively. Food manufacturing is adjusted upward to reflect the number of fluid milk companies and of unrefined fats and oils companies excluded from manufacturing prior to 1958.

[b] Part of this increase is due to the redefinition of logging camps from forestry to the manufacturing sector in 1958.

TABLE 3

Classification of National Food and Tobacco Product Classes by Bain's Concentration Types, 1958, 1967, and 1977. *(percent)*

		1958		*1967*		*1977*	
Bain's Concentration Type[a]		*Product Classes*	*Value of Shipments*	*Product Classes*	*Value of Shipments*	*Product Classes*	*Value of Shipments*
I.	Highly concentrated oligopolies	22.2	19.6	21.3	16.3	29.4	24.4
II.	High-moderate concentrated oligopolies	20.4	14.2	25.0	21.6	25.2	26.1
III.	Low-grade oligopolies	34.3	34.6	38.0	35.7	32.8	25.6
IV.	Unconcentrated	23.1	31.6	15.7	26.4	12.6	23.9

Source: Bureau of the Census (1977c)

[a] Bain's (1968:124–133) concentration categories are as follows: type I, $CR8 \geq 85$ or $CR4 \geq 65$; type II, $70 \leq CR8 < 85$ or $50 \leq CR4 < 65$; type III, $45 \leq CR8 < 70$ or $35 \leq CR4 < 50$; and type IV, $CR8 < 45$ and $CR4 < 35$. In each year SIC 20999, other food preparations not elsewhere classified, was omitted.

TABLE 4

Average Unweighted and Weighted Four-firm Concentration Ratios by Categories of Advertising Intensity for Eighty-five U.S. Food and Tobacco Product Classes, 1958 to 1977.

		Advertising-to-Sales Ratio Category[a]			
Year	*All Product Classes N = 85*	*0% (0) N = 29*	*0% to 1% (0.5%) N = 21*	*1% to 3% (1.7%) N = 20*	*> 3% (6.25%) N = 15*
Average Unweighted Four-Firm Concentration Ratio					
1977	50.3	42.8	41.9	58.5	65.8
1972	49.0	42.7	40.1	56.6	63.4
1967	47.4	43.0	38.5	53.7	60.0
1963	46.4	42.9	36.9	51.3	60.0
1958	46.5	44.7	36.7	52.0	56.3
Change[c] 1958–77	+3.8	−2.0	+5.2	+6.6	+9.5

Source: Connor, Rogers, Marion, and Mueller, The Food Manufacturing Industries, Structure, Strategies, Performance, and Policies, Lexington Press, 1984.

TABLE 5

Aggregate Concentration among the Largest Food Manufacturing Companies, Selected Years 1947–81.

Sectors	*Number of Firms*	*Year*							
		1950	*1954*	*1958*	*1963*	*1967*	*1972*	*1977*	*1981*
					Percent of Assets[a]				
1. Food manufacturing	100	46.3	—	—	53.9	67.4	68.5	74.4	75.1
2. Food manufacturing	200	60.0	—	—	67.9	73.4	76.7	81.1	81.5
					Percent of Value Added[b]				
3. Food manufacturing, excluding alcoholic beverages	100	—	41.9	43.1	45.8	49.0	51.2	53.0	—
4. Food manufacturing, excluding alcoholic beverages	200	—	48.7	50.1	53.5	58.2	62.9	64.4	—
5. Food and tobacco manufacturing	100	—	—	—	—	50.8	53.2	54.9	—
6. Food and tobacco manufacturing	200	—	—	—	—	59.8	63.0	65.3	—

— = Not available.

[a] Connor (1982b:38). Estimates shown for last four years actually are for years 1969, 1974, 1978, and 1981.

[b] Data from special Census tabulations, Bureau of the Census (1977c), and NCFM (1966i).

TABLE 6

Top-Four Positions Held by the 100 Largest Food Manufacturers, by Concentration Level, 1967, 1972, and 1977.

Concentration Ratio (CR4)	*Number of Product Classes*			*Percent of Top-Four Positions Held by Top 100*		
	1967	*1972*	*1977*	*1967*	*1972*	*1977*
≥ 80	13	12	11	67.3	81.2	79.5
70–79	7	5	11	71.4	75.0	75.0
60–69	7	18	14	64.3	68.1	66.1
50–59	22	24	25	79.5	78.1	73.0
40–49	18	18	17	63.9	55.6	57.4
30–39	27	28	24	63.9	52.7	59.4
<30[a]	17	15	15	54.4	56.7	48.3
National markets	112	121	118	66.5	65.1	65.0
Local markets	16	23	23	76.6	70.7	71.7
Total	128	144	141	67.8	66.0	66.1

Source: Rogers (1984a).

[a] Product class SIC 20999, other food preparations not elsewhere classified, was omitted from each year because the CR4 is meaningless for this miscellaneous-products class. Therefore the sum of product classes will appear as one less than the national total.

Source: Connor, Rogers, Marion, and Mueller, The Food Manufacturing Industries, Structure, Strategies, Performance, and Policies, Lexington Press, 1984

TABLE 7

FTC and Department of Justice Antitrust Cases in the Food System by Statute, 1950–84.

						Sherman Act					
	Clayton Act				*FTC Act*	*§1*		*§2*			
Period	§2	§3	§7	§8	§5	*Civil*	*Criminal*	*Civil*	*Criminal*	*Total*[a]	Actual Cases[b]
1950–55	48	1	3	2	51	19	32	10	9	175	158
1956–60	210	1	18	0	38	11	19	2	0	299	290
1961–65	47	0	11	0	39	14	21	5	5	142	130
1966–70	15	0	14	0	24	10	11	1	0	75	70
1971–75	7	1	16	2	72	33	26	3	0	160	152
1976–80	1	1	18	0	19	15	17	0	0	71	64
1981–84[c]	0	0	6	0	9	10	9	0	0	34	32
Total 1950–84	328	4	86	4	252	112	135	21	14	956	896

Source: Compiled from Commerce Clearing House *Trade Regulation Reporter* and *Blue Book.*

[a] This column, a horizontal sum of the columns to its left, gives the total number of times all statutory provisions shown have been alleged for the indicated time period. This column is to be contrasted with the column giving the total number of actual cases. The differences between the two columns stem from cases alleging more than one statutory violation.

[b] This column shows the total number of complaints, consent orders, and indictments. The totals given for the Clayton Act derive from Department of Justice cases and FTC complaints and consent orders. The Department of Justice often institutes both civil and criminal actions in the same facts. Hence two complaints may correspond to what is really one set of facts, particularly for Sherman Act section 1 cases.

[c] Through May 15, 1984.

TABLE 8

FTC and Department of Justice Cases in the Food System by Leading Industry and Statute, 1950–84.

Statute	*Bakery Products*	*Beer and Liquor*	*Milk and Dairy Products*	*Fish and Seafood*	*Fruits and Vegetables*	*Tobacco and Tobacco Products*	*Total*
Clayton Act							
Section 2	3	4	18	32	111	10	178
Section 3	1	0	3	0	0	0	4
Section 7	8	16	11	1	3	3	42
Section 8	1	0	0	0	0	0	1
FTC Act							
Section 5	19	5	35	10	14	28	111
Sherman Act							
Section 1	42	42	43	15	18	17	177
Section 2	2	0	9	3	7	2	23
Total[a]	~~86~~ 76 (79)	67 (67)	119 (104)	61(57)	153 (145)	60 (59)	~~546~~ 536 (511)

Source: Compiled from Commerce Clearing House *Trade Regulation Reporter* and *Blue Book.*

[a] If a complaint or indictment challenged a firm on several statutory provisions, each provision has been entered separately. For this reason, a vertical summation of the cases for an industry may exceed the total number of cases in the industry; the actual number of cases in an industry is given in parentheses.

[b] Because other products are also involved, this column does not equal totals given in table 8–1.

Source: Connor, Rogers, Marion, and Mueller, The Food Manufacturing Industries, Structure, Strategies, Performance, and Policies, Lexington Press, 1984.

Senator **Grassley**. I have some questions that I would like to address to you.

First, can you distinguish the indirect seller case from the indirect buyer case—in other words, why should we give relief only to indirect sellers?

Dr. **Mueller**. Well, I think that some of my last comments about there being other situations where *Illinois Brick* should likewise be changed, has some relevance here. But I think the most direct point is the one I made at the end of my testimony, namely that the supply of agricultural products is very inelastic, and that in this situation we would expect that the seller would be the primary victim of a price-fixing situation.

Senator **Grassley**. Professor Polden?

Professor **Polden**. Yes. I would just note that many of the concerns which I spoke to would apply to both indirect sellers and indirect buyers. But I would agree with Dr. Mueller that this bill, which looks at agricultural producers, identifies an area where the failure, if you will, of the *Illinois Brick* rationale has been most acute. I think, as I pointed out, there are a number of exemptions that have been created, but none of them have permitted agricultural producers to get their case to trial. And I think that the bill protects a group of types of plaintiffs that the difficulties of maintaining an action through the initial stages has been most clear. But in other respects, I think that those concerns are applicable to both indirect sellers and indirect purchasers.

Senator **Grassley**. Mr. King?

Mr. **King**. I would concur with what has been said already, Senator. The thing that strikes me probably the most is that the technicalities involved in filing a suit against any violator—this bill would erase those technicalities and make it much clearer for the person who has incurred damage to go to court on a private basis or otherwise.

We feel mainly that *Illinois Brick* gives a crutch for not only attorneys general, but the Government does not want to prosecute these cases. We need a clearcut path for farmers and ranchers to go to private attorneys and say, "We have been wronged. Here is our case," and they do not have to sit down and say, "But you have *Illinois Brick,* and you sold this to a processor, and not directly to a customer."

Like I mentioned earlier, we were familiar in the Dimmitt plant that we did sell directly, and therefore, we could use the Sherman antitrust laws and recoup damages. And we did recoup damages for that injustice. But it looks to me like it would make it much simpler.

Senator **Grassley**. The second question is whether you can help us respond to the criticism that this bill will only benefit the producer at the consumer's expense.

Dr. Mueller?

Dr. **Mueller**. I guess I would have to see what kind of an argument someone has made on that point, but I really cannot visualize a situation in which consumers are going to be injured because someone who has taken an overcharge in a stage in the distribution system because he has monopoly power takes that money from farmers unto himself. There is no reason to think that because he has that power to take it away from farmers that, then, he would turn around and give it to consumers.

So, if he were forced to give it up, it would be coming at the expense of that processer or retailer, whoever it was, rather than at the consumer's expense.

So I just do not believe there could be a very good argument made that consumers are injured by this.

Senator **GRASSLEY**. Professor Polden?

Professor **POLDEN**. Yes, to take that point, it seems to me that that criticism assumes some factors that do not seem to be evident in many industries. It seems to me that in many industries, the objective of the midlevel firms that we are talking about here concerns the fact that of these firms in an unusual, fulcrum-like position. They are able to exercise or possess monopsony power, looking at the cattle or grain markets, that is, the market that they purchase in; while at the same time, they are able to exert some monopoly power looking at the seller market, that is, looking at consumers.

I would also agree that there does not seem to be any indication at all that the maintenance of responsive litigation by cattlemen or grain growers, for example, in having them obtain their damages, is going to be translated down the chain.

Senator **GRASSLEY**. Mr. King?

Mr. **KING**. I think probably, Senator, it would be the opposite effect. It would probably come as near protecting the consumer as it would hurting the consumer. Any time you have a viable agricultural industry, which we have not had in years, as you know, but this would be a vital link in achieving more profit to the producer himself—the cattleman and the farmer and the grain man—and therefore, he would spend more money, employ more employees—the turn of the dollars seven times, if you please—many, many aspects that would help the consumer groups, and not only that, I cannot see conceivably any way it would raise the price to consumers. In fact, it ought to help it.

Senator **GRASSLEY**. Since industry concentration alone is not evidence of antitrust violations—can you give us some specific examples of collusive activity by purchasers of agricultural products? And, if it is necessary to submit something for the record, I would be glad to leave the record open for that purpose.

Dr. Mueller?

Dr. **MUELLER**. Through the years, there have been a number of cases involving collusion among processers and distributers. I am not saying this is going to affect this legislation, but in the last 2 weeks, the Justice Department brought a case against food retailers in New England for colluding. I remember when I was at the Federal Trade Commission, there were a number of cases, one involving grain, where an agreement was made as to the amount of hard wheat versus soft wheat the macaroni producers would take because they did not want to, as they viewed it, drive up the price of wheat: so they colluded to avoid raising prices.

There have been a lot of other antitrust actions. For example, in the bread industry, there have been quite a number of cases involving collusion among bakers in various parts of the country.

Alas, I agree with your statement about concentration alone not being a violation of the antitrust laws as such. But the reason this administration, like others, has been concerned with increasing concentration, say, through mergers among competitors is for one simple reason, and that is it creates a greater opportunity for collusive activity.

Senator **Grassley**. Thank you.

Professor Polden?

Professor **Polden**. I would just indicate a case I am familiar with, the beef industry case, and this is an interesting case, particularly interesting insofar as seeing the negative impact of the *Illinois Brick* rule. The case concerns, in part, allegations of price-fixing and overcharges by the major retail grocers in the United States through the facilitating use of a marketing reporting service. That case would be, at least in my estimation, a fairly clear and current example of collusive activity by agriculture product purchasers in the United States. The cases against the retailers ultimately were dismissed by the court because of the effect of *Illinois Brick*.

Senator **Grassley**. Mr. King?

Mr. **King**. Well, of course, as I mentioned earlier, Senator, since agricultural producers mainly sell to grain independent and cooperative elevators, who in turn sell to the large grain conglomerates, it is pretty hard to prove or disprove antitrust violation. We are certain that they take place, but proving them is another thing. I think, as we mentioned earlier, the great Russian wheat sale was an historical case within itself of withholding information, mainly, at that particular issue. And of course, the one I mentioned prior, the one we just won a little less than a year ago against a large wet miller who conspired to lower the price of corn products.

So I am not an attorney, Senator. I am just a broke farmer, more or less, right now. I do read these cases and read these books, and I talk to people who are involved in them. But as far as just reciting off the top of my head as an attorney, I could not do that—but I do know of some.

Senator **Grassley**. Thank you.

As I indicated to you, we will leave the record open for a period of 15 days, so if there is any additional comment from any of you, it will be possible to submit that in writing.

I want to thank this panel now. I am finished with my questioning. There are Senators on the committee who obviously cannot be here and they may be submitting questions to you in writing. We would also appreciate it if you could get those answers back to us within that same 15-day period of time.

Thank you very much.

I would first like to introduce my good friend, Dwight Vredenburg. Dwight is chairman and chief executive officer of the board of directors of Hy-Vee Food Stores, Inc. That is a long-established business in my State and several other States, as well. He has been with Hy-Vee for 49 years and is on the board of directors of the Food Marketing Institute, a very important trade association here in Washington, DC.

Next, we have Mr. James Rill, a prominent lawyer in the Washington area. He has been a partner with Collier, Shannon, Rill &

Scott for 25 years, and is also a member of the Antitrust Section of the ABA. Mr. Rill is on the Advisory Board of the Bureau of National Affairs of Antitrust Trade and Trade Regulation Reports.

Mr. James Calder, who is an attorney with the New York law firm of Willkie, Farr & Gallagher, is also a member of the task force of the ABA Antitrust Section. Mr. Calder reviewed legislation in 1983 and 1984 to overturn the Supreme Court's decision in the *Illinois Brick* case, and he also participated in the ABA's first task force on *Illinois Brick*.

I would like to express my gratitude to each of you, for your patience, and for coming here to testify on this very important decision.

So, Dwight, we will start with you.

STATEMENT OF A PANEL, INCLUDING: DWIGHT VREDENBURG, CHAIRMAN OF THE BOARD OF DIRECTORS AND CHIEF EXECUTIVE OFFICER, HY-VEE FOOD STORES, INC., CHARITON, IA, ACCOMPANIED BY JAMES R. RILL, ATTORNEY, COLLIER, SHANNON, RILL & SCOTT, WASHINGTON, DC; AND JAMES J. CALDER, ATTORNEY, WILLKIE, FARR & GALLAGHER, NEW YORK, NY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. VREDENBURG. Thank you, Senator. I appreciate this chance to testify on this very important subject.

My statement is reasonably short and is more or less in the nature of a resume, so I would appreciate it if I could go ahead and read it verbatim.

Senator GRASSLEY. Please proceed.

Mr. VREDENBURG. Mr. Chairman, I am Dwight Vredenburg of Chariton, IA, and I am appearing here today to express the views of the Food Marketing Institute on S. 2835. With me is Mr. James Rill of the Washington law firm of Collier, Shannon, Rill & Scott, outside counsel to the Food Marketing Institute.

The Food Marketing Institute, known as FMI, is a nonprofit association that conducts programs in research, education and public affairs on behalf of its 1,300 members—food retailers and wholesalers and their customers. FMI's member companies operate over 17,000 retail food stores with a combined annual sales volume of $130 billion in the United States. More than three-fourths of FMI's membership is comprised of independent supermarket operators or small regional firms.

As to my own personal background, I am the chairman and CEO of Hy-Vee Food Stores, with headquarters in Chariton, IA. We operate 134 supermarkets in the States of Iowa, Missouri, Minnesota, Nebraska, Illinois, and South Dakota, with an annual volume in excess of $1 billion. Of our total number of stores, 112 are in Iowa. We employ over 9,200 men and women in our Iowa stores and are one of the largest employers in the State.

This is the sixth time that the Food Marketing Institute has testified against legislation to overturn, in one way or another, the Supreme Court's decision in the *Illinois Brick* case. As grocery retailers, we deal directly with consumers, so the *Illinois Brick* decision has had no effect on the ability of consumers, or attorneys general acting on behalf of consumers, to press antitrust suits against supermarkets. They have always been able to bring these suits, and they continue to be able to do so.

The legislation you are considering today, S. 2835, is unique. Unlike previous *Illinois Brick* legislation, this bill has no consumer protection aspects. Unlike Senator Gorton's proposed bill, S. 915, on which this committee held hearings on May 16, 1984, S. 2835 is not a limited repeal of *Illinois Brick*. S. 2835 would simply carve out an exception from the *Illinois Brick* rule for suits by indirect sellers of certain agricultural products.

The bill makes no attempt to alleviate the serious problems of proof which are inherent in indirect seller cases. These problems are, however, even greater than the indirect buyer problems found by the Supreme Court to be so severe as to undermine the deterrent effect of the treble damages remedy. The bill's failure to address the adverse consequences of indirect suppliers treble damages suits makes it apparent that its only purpose is to revive the recently terminated damage claims in the beef litigation.[1]

Let me elaborate on that point for just a moment, Mr. Chairman. There have been those over the past decade who have presented an unusually skewed and personal view of our Nation's agricultural economy. They have, if I may characterize their views, blamed the difficulties of America's farmers on our food distribution system. They hold that the many small independent producers are forced to sell to only a few buyers and that those few buyers conspire to depress artificially the prices received by farmers. This is the theory of the beef litigation I just mentioned.

There are two things I would like to say about that. First, being from Iowa, I am well aware that our farming community has not shared fully in our economic recovery, along with other sections of the economy. Many farmers are in serious trouble and need help. I feel that acutely, because those farmers are my neighbors, my friends, and my customers.

And parenthetically, I might say that I have a farm in Decatur County in southern Iowa, and I am painfully aware of the situation for Iowa farmers today.

But it seems to me that high interest rates, unwise land investment, weather, Federal farm policy, and a long list of other factors need to be examined in any rational attempt to describe the reasons why parts of our agricultural sector are hurting.

Second, if indeed producers can demonstrate that the people they sell to are lowering prices artificially and are conspiratorial price fixers in the traditional sense of the term, why not sue them? Sue the meatpackers, sue the grain elevator operators—sue those that they are forced to deal with.

In fact, I understand that the plaintiffs in the beef litigation have outstanding damage claims against various meatpackers. These claims, which are inconsistent with their pass-on allegations against the retailers, show that sellers are now without a remedy for claimed damages from price fixing by their customers. This has nothing to do with *Illinois Brick*. It has to do with taking action on a theory espoused by a small group who have made an almost full-time profession out of offering simplified explanations to America's terribly complex farm problem.

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[1] In re Beef Ind. Antitrust litigation, 542 F. Supp. 1122 (N.D. Tex. 1982), aff'd., 710 F.2d 216 (5th Cir. 1983), cert. denied, 52 U.S.L.W. 3599 (Fed. 21, 1984).

It is worth remembering that those allegedly few middlemen may buy from many farmers, but they also sell to an awful lot of grocers. The retail food business is in a tremendous period of transition. New store formats, changing demographics, different consumer preferences, the advent of electronics in the market, including scanners at the checkout counters, electronic funds transfer systems of a bewildering variety, and more, all make for more uncertainty in our marketplace than at any time since the introduction of self-service back in the 1930's.

So perhaps those espousing this theory should look first at the solutions that already exist, rather than try to follow in the tortuous path of the *Bray* case and the beef litigation.

The Justice Department's assessment of the allegations in *Bray* v. *Safeway* is critical to an evaluation of S. 2835. This case served as the basis for the beef litigation. However, the Justice Department staff determined, after a comprehensive review of the record, that the allegations in the *Bray* case did not warrant Government action. The conclusion of that study underscores the anticompetitive effects of indirect seller cases, and I quote:

> The long range importance of this case for the industry is uncertain and may turn upon what happens in similar cases which have been filed in the wake of the *Bray* case. If it has any impact however, it will likely be anticompetitive. *Bray* fostered and perpetuated misconceptions about the industry, most notably concerning the spread statistics. The antitrust laws were used to protect cattlemen from the exigencies of the marketplace, to punish size and efficiency of operation, and to further discourage efforts by retailers to minimize product costs. The net effect is to benefit cattlemen at the expense of consumers.[1]

Let me turn now to the specific substantive objections we have to S. 2835. I will describe the first, and Mr. Rill, the second.

They are: One, the practical impact a reversal of the *Illinois Brick* decision would have on the marketplace, and two, the degree of complexity inherent in indirect seller suits.

Should the *Illinois Brick* decision be reversed, what impact would it have on the marketplace? More specifically, what would be the effect on consumers if indirect seller suits proliferated?

Most simply, it would be as if the Congress had mandated higher food prices. The reasoning that supports this conclusion is straightforward. When a retailer enters into his price negotiation with his direct supplier, he bargains for the lowest possible price he can obtain. Grocers take very seriously their role as buying agents for the publlc. But suppose the grocer not only had to bargain with his direct supplier, but also had to concern himself with the appearance of the bargaining process to an absent indirect seller. In other words, the retailer, while bargaining with his direct supplier, must worry about the perceptions of the remote original producer of the commodity.

The obvious conclusion is that this situation will have a chilling effect on the retailers' efforts to obtain the best possible prices for his customers. Whether the commodity is beef or lettuce or whatever when the market price is less than the original producers think it ought to be, their reaction could well be to assume that something is wrong in the marketplace and sue to correct it.

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[1] U.S. Department of Justice Memorandum, Beef Investigation-Food Chains-Analysis of *Bray* v. *Safeway*, No. C-48536-OJC at 60.

The indirect seller's attitude could reflect the point of view that at least an out-of-court settlement could make up partially for depressed market prices. The ultimate cost of such indirect seller suits would, of course, be borne by the consumer, the very individual whose interests are supposed to be protected by the antitrust laws. The combination of potentially increased legal costs and less vigorous bargaining by the retailer would be reflected in the prices on supermarket shelves. This might not be the end result desired by proponents of overturn of the *Illinois Brick* decision, but it would be the practical effect of their actions.

Now I would like to ask Mr. Rill to discuss our second major point.

Mr. RILL. Senator, it may be more convenient if I were to walk you through this chart on the easel before you and reproduced in my prepared statement.

You had asked the preceding panel to distinguish between indirect buyer suits covered by *Illinois Brick* and indirect seller suits, which are also covered by the Supreme Court's decision. What we have here is a chart that was included in the decision by Judge Patrick Higginbotham of the northern district of Texas in dismissing the beef industry antitrust litigation on defendant's motion for summary judgment.

The chart actually is a fair representation of the flow of product from cattle ranchers down through various buyers for sale through retail grocery stores, hotels, fast food outlets, restaurants, and the Government. The arrows trace the flow of the product from ranchers to cattlefeeders, terminal auctions for some part of the product, through packers; then, down the beef side of the product line—the product goes to jobbers, fabricators or packers, subpackers, or direct to retail grocery chains and others who sell to consumers.

There is, of course, a substantial market for byproducts, offal, and the like, which goes to the tanning industry, among others.

I say this would be a fair representation of the flow of product for purposes of an indirect buyer suit. It would serve as an example, if retail grocery chains were suing cattlefeeders, the actual plaintiffs in the beef litigation in that the arrows point downstream through the chain of production and distribution.

Actually, the case as it has been described by the preceding panel, involved allegations of underpayments going upstream, rather than overcharges going downstream. So, to illustrate fully the complexity of the underpayment tracing, it would be necessary to have a reverse set of arrows that would go from, as the allegations of the complaint state, the retail grocery chains back up to the jobbers and fabricators, to the meatpackers, to the terminal auctions, to the cattlefeeders, who are alleging that they are injured in this case. So, as the product moves downstream, the alleged underpayment subsequently moves back upstream.

The second complexity that resides in that particular situation is the timeframe that I have just suggested. In fact, the underpayment that allegedly occurs, occurs as to a product, obviously, that has already been sold by the feeder, but is translated at some later time to a product that is sold in the future. Thus, if the retailer allegedly is underpaying for a boxed beef product at his level, that underpayment could be reflected back up to the cattlefeeder as another product comes back through the jobber or fabricator, then another, later, product, such as the carcass comes out of the meatpacker, and another, later, product comes out of the terminal operator, and then finally, reflected back to the fat cattle that is sold by the cattlefeeder. Finally, a third complexity exists that arises from the fact that the product changes its character at each stage along the channel of distribution; from a fat cattle, to a carcass, to boxed beef, to retail cuts.

Therefore, it is quite plain that indirect seller cases are considerably more complex than the undeniably complex indirect buyer cases with which the Supreme Court dealt in the *Illinois Brick.*

Of course, all of this process would take place after the plaintiffs were able to make a threshold finding of price fixing stick, and with respect to that issue, of course, the defendants in the beef litigation have, and continue, vigorously to deny that any conspiracy existed. We would, in that regard, cite you to the Justice Department's Antitrust Division staff's analysis of the grandfather of the beef cases, the *Bray* antitrust litigation.

Unfortunately, of course, the cost even of winning an antitrust case is not cheap. We estimate that from the time that the motion to dismiss the case was filed in 1977 up until the ultimate dismissal by Judge Higginbotham, its affirmance by the fifth circuit, and the denial of certiorari by the Supreme Court, some $20 million were expended by the defendants in the effort to defend themselves against these allegations.

Senator GRASSLEY. What percentage of the retail business was affected?

Mr. RILL. I have not calculated the exact percentage. It was a very considerable proportion of beef retailers and food chains.

Senator GRASSLEY. But several different chains?

Mr. RILL. Oh, at one time, over 30 chains were involved as defendants, ranging from all of the largest 10, down to very small operators, such as Circle-K, Big Bear of Ohio, really, quite small operators, considerably smaller, for example, than Hy-Vee.

There is one final point to make with respect to this legislation, Senator, and that is, as a technical matter. The complexity in this particular bill is somewhat exacerbated when compared with, say, bills introduced by Senator Gorton and others. The bill introduced by Senator Baucus, S. 2835, makes no attempt to establish any facility whereby alleged pass on or pass up of an underpayment might be allocated among various levels of manufacture and distribution back up the chain. The Gorton bill, for example, Mr. Chairman, has a presumption with respect to indirect buyer suits that there is a total pass on of any overcharge from the intermediate direct buyer down to the buyer once-removed.

The bill introduced by Senator Baucus simply states that the damage shall not include any amount that the immediate seller was able to pass on to the indirect seller. It makes no effort to attempt to allocate damages by creating any presumptions, but simply leaves it with an amorphous suggestion that that is something that will have to be worked out.

In conclusion, Senator, we do think that your question was a very pertinent one; that is, what are the differences between indirect seller and indirect buyer suits. We think they are both complex. We think that the indirect seller suits have a particular capacity for complexity that makes them incompatible with the rationale, which we think is essentially correct, of the Supreme Court in the *Illinois Brick* case. Therefore, we would urge that this legislation not be favorably considered.

Thank you, Mr. Chairman.

[The following was received for the record:]

ILLINOIS BRICK TESTIMONY

"AGRICULTURAL PRODUCERS PROTECTION ACT"

S. 2835

September 24, 1984

James R. Rill
Collier, Shannon, Rill & Scott
1055 Thomas Jefferson St., N.W.
Washington, DC 20007

Mr. Chairman:

Thank you. I am James Rill, partner in the firm of Collier, Shannon, Rill and Scott here in Washington. I am outside counsel to the Food Marketing Institute. Let me refer to a chart included in the decision of Judge Patrick E. Higginbotham of the United States District Court for the Northern District of Texas prepared by the court In re Beef Antitrust Litigation, 542 F. Supp. 1122 (N.D. Tex. 1982). We have reproduced the chart for purposes of illustration. It could be used to illustrate the impossibility of tracing overcharges from the manufacturer to the consumer. Actually, it is much more complex than that. Judge Higginbotham was discussing an indirect seller case in his decision. The arrows properly track the path of distribution of the commodity involved, in this case, beef. But the allegation in the case concerned underpayments. Therefore, there would have to be reverse arrows added in order to demonstrate that, for example, retail grocery chains forced an underpayment on indirect sellers. That underpayment can't flow with the commodity because that commodity has already passed in the opposite direction. Assuming there had been an original underpayment resulting from a conspiracy of purchasers, then on some subsequent transaction the packer would have to pass the underpayment one step backward possibly to a terminal operator. And the terminal operator, at some even more remote subsequent transaction, would have to force the underpayment back another step up the chain of distribution to the cattle feeders who allegedly were the wronged parties in this scheme.

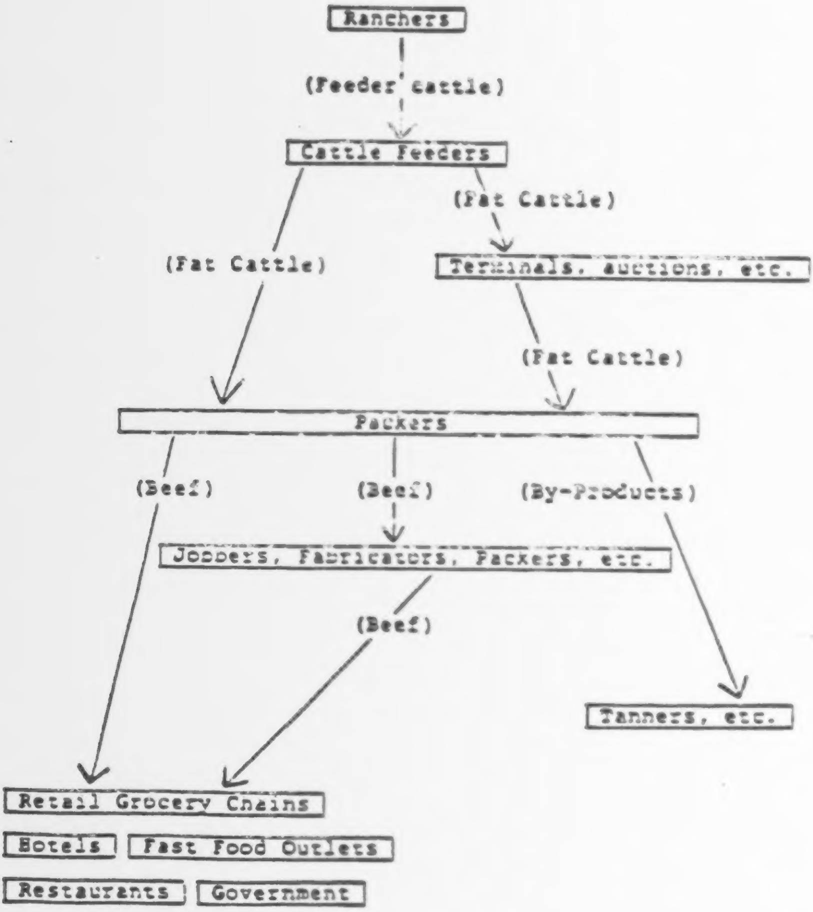
Mr. Chairman, if that seems unusually complicated and confusing, imagine trying to sort out the time frames in which these events could occur, with the product moving down the chain of distribution while the alleged underpayment moved up that same chain of distribution. Consider also how this difficulty is exacerbated by the fact that the product changes character, from fat cattle, to carcass, to boxed beef, to retail cuts at various states. The complexity of tracing alleged damage from an underpayment all along the line, would overwhelm any court.

Of course, that process would follow the threshold requirement of proving a price fixing conspiracy had existed in the first place. Mr. Chairman, I don't wish to belabor the obvious. What I have described is an impossible task for any court to face, but it could become typical of the burdens that may be imposed on the courts if the Illinois Brick decision is overturned.

Parenthetically, may I say that being involved in a complex antitrust case and winning is not cheap. From the time the defendants asked the court to dismiss the beef cases because of the Illinois Brick rule until the Supreme Court finally denied certiorari in February of this year, approximately seven years passed. I would estimate conservatively that the defendent supermarkets spent at least $20 million in legal fees and costs during that period. That does not take into account the value of the time of defendant company executives devoted to the non-productive work associated with the case.

Finally, Mr. Chairman, S. 2835 represents a particularly troubling sort of Illinois Brick repealer legislation. The primary problem with indirect seller and purchaser antitrust cases is that they inevitably involve pass-on calculations of great complexity and uncertainty. The ultimate impact of indirect seller suits is to undermine the deterrent effect of the antitrust laws. At least, some of the previous bills that have been introduced to modify or overrule Illinois Brick recognized the need to address this problem. The most recent version of Senator Gorton's bill, for example, attempts to simplify the tracing procedure by creating a rebuttable presumption that the full amount of an overcharge is passed on to the indirect purchaser. S. 2835 by contrast, contains no answer to the nearly insoluble problem of tracing an undercharge in an indirect seller case, a problem that is illustrated by the facts of the Beef Litigation. For this reason and for others set forth above, S. 2835 must be rejected. Its passage would saddle the courts with hopelessly complex and potentially anticompetitive antitrust claims. Vigorous and consistent enforcement of the antitrust laws as they now exist is the best assurance of a free and competitive market place.

Thank you, Mr. Chairman. Mr. Vredenberg and I will respond to any questions you may have.


Ranchers
(Feeder cattle)
Cattle Feeders
(Fat Cattle)
(Fat Cattle)
Terminals, auctions, etc.
(Fat Cattle)
Packers
(Beef)
(Beef)
(By-Products)
Jobbers, Fabricators, Packers, etc.
(Beef)
Tanners, etc.
Retail Grocery Chains
Hotels
Fast Food Outlets
Restaurants
Government

Senator **Grassley**. Thank you.

Was your testimony an extension of Mr. Vredenburg's, Mr. Rill?

Mr. **Rill**. Yes, Senator.

Senator **Grassley**. Dwight, if you have to be at the plane at 5:10, I think you ought to give yourself an hour. I mean, that is up to you, but——

Mr. **Vredenburg**. I expect I should, yes.

Senator **Grassley**. Fine. Feel free to go, and Mr. Rill will be here to answer questions.

Mr. **Vredenburg**. Thank you, Senator.

Senator **Grassley**. Mr. Calder, would you proceed, please, with your testimony?

Mr. **Calder**. Thank you, Senator.

I appreciate the opportunity to appear before you today as a representative of the American Bar Association. I was a member of the ABA antitrust section task force, which reviewed and reported on proposed legislation to repeal or modify the Supreme Court's decision in *Illinois Brick* in 1983, and I also participated in the preparation of a report on *Illinois Brick*, which was prepared by an earlier task force of the antitrust section in 1978.

The 1983 task force report has been published in volume 52 of the Antitrust Law Journal, and it contains a detailed analysis of the many difficult questions raised by proposals to overturn *Illinois Brick* and its predecessor case, *Hanover Shoe*.

You mentioned earlier, Senator, that the record in these hearings would be held open for some time. What I would like to do, with your permission, is to forward a copy of the task force report to be included in the record.

The thrust of my testimony today, which I will just briefly summarize, is that any proposal to reverse the Supreme Court's decisions in *Illinois Brick* and *Hanover Shoe* must address the issues which caused the Supreme Court to decide those cases as it did.

The Court's rejection of the concept of the passing on of damages in those decisions—a concept which applies to suits brought by sellers as well as purchasers—had several bases.

First, the Court was unwilling to complicate treble damage actions, with attempts to trace the effects of the overcharge through the distribution chain.

Second, the Court was concerned that the introduction of the pass-on question would impair the effectiveness of the treble damages remedy by diluting a direct purchaser's potential recovery and thereby reducing his incentive to sue.

Third, the Court in *Illinois Brick* expressed deep concern that a rule permitting indirect purchasers to bring suit would create a severe risk that defendants would be subjected to multiple liability in treble damage actions.

It is the view of the ABA that any legislation intended to overturn *Illinois Brick* and *Hanover Shoe* must necessarily face these three vital issues which were the bases for the Court's decisions in those cases.

We do not believe that this bill does so, and accordingly, must oppose it.

[The following was received for the record:]

STATEMENT OF

JAMES J. CALDER

on behalf of the

AMERICAN BAR ASSOCIATION

September 24, 1984

My name is James J. Calder. I am an attorney in New York City, where I am in the private practice of law. I appreciate the opportunity to appear before you today as a representative of the American Bar Association and to present its position on S. 2835. I was a member of the ABA Antitrust Section Task Force which reviewed and reported on proposed legislation to repeal or modify the Supreme Court's decision in Illinois Brick in 1983 and I also participated in the preparation of a report on Illinois Brick which was prepared by an earlier Task Force of the Antitrust Section in 1978. The 1983 Task Force Report has been published in 52 Antitrust Law Journal 841 (1983) and it contains a detailed analysis of the many difficult questions raised by proposals to overturn Illinois Brick and its predecessor Hanover Shoe.

I do wish to note at the outset that my testimony will be limited to the core issues raised by S. 2835 and other efforts to overturn Illinois Brick and Hanover Shoe. It does not address questions concerning the narrow scope of S. 2835 as it applies to indirect sellers of certain agricultural products and livestock.

It is the position of the ABA that any proposal to reverse the Supreme Court's decision in Illinois Brick and Hanover Shoe should address the issues which caused the Supreme Court to decide those cases as it did. In those cases, the Court refused to permit antitrust defendants or plaintiffs to assert that damages suffered by the person who purchased directly from the defendant were in turn "passed-on" to the purchaser's customers.

The Court's rejection of the passing-on concept -- which applies to suits brought by sellers as well as purchasers -- had several bases. First, the Court was unwilling "to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs and profits and of showing that these variables would have behaved differently without the overcharge." 431 U.S. 720, 725. Second, the Court was concerned that the introduction of the pass-on question would impair the effectiveness of the treble damages remedy by diluting a direct purchaser's potential recovery, thereby reducing his incentive to sue. Third, in Illinois Brick, the Court expressed concern that a rule permitting indirect purchasers to bring suit would create a severe risk that defendants would be subjected to multiple liability in treble damage actions.

It is the view of the ABA that any legislation overturning Illinois Brick and Hanover Shoe must address these three issues. We do not believe that S. 2835 does so.

1. Complexity

The practical problems of proving passing-on have not changed since Illinois Brick or Hanover Shoe were decided. In order to prove, for example, the injury suffered by cattle feeders who were underpaid for their cattle as a result of a conspiracy by grocery chains to fix the prices they paid for beef, it would be necessary to reconstruct an entire series of transactions involving the grocery chains, meat packers, other middlemen and the cattle feeders. In effect, the underpayment would have to be traced from the alleged price fixers, through their direct sellers to the indirect sellers seeking to recover damages. Not only would the underpayment have to be traced, but for each seller at each level of the chain of distribution, a determination would have to be made as to how much of the underpayment was absorbed by the seller and how much was passed on to the seller's supplier in the form of lower prices. This inquiry, which would have to be made for thousands of transactions, might be feasible for an economist doing a hypothetical exercise, but as Justice White wrote in Illinois Brick, "'in the real economic world rather than an economist's hypothetical model,' the latter's drastic simplifications generally must be abandoned," 431 U.S. at 742.

The example of the cattle feeder, who would be permitted to sue under S. 2835, is not hypothetical. It is a real antitrust case. In Re Beef Industry Antitrust Litigation, 542 F. Supp. 1122 N.D. Tex. (1982), aff'd, 710 F. 2d 216 (5th Cir. 1983). In the Beef litigation Judge Higginbotham considered whether the cattle feeders could proceed with their case against the supermarket chains under an exception to Illinois Brick which permits indirect purchasers or sellers to sue where the direct purchaser or seller has the functional equivalent of a cost plus contract with the defendants. The court found that the cost plus exception was inapplicable because a number of factors which affected the prices received by the cattle feeders were present in the chain of distribution and these factors revealed that a cost plus relationship did not exist.

The court's review of the factors affecting price is instructive here because, if S. 2835 becomes law, courts and litigants will be forced to deal with precisely the kind of factors which, as Judge Higginbotham found, influenced live cattle prices in the Beef litigation. Those factors included: (1) the meat packers' need for cattle on a given day; (2) variations in competitive bidding and individual negotiations between packers and feeders; (3) variations in price resulting from errors made by packers in estimating the yield characteristics for each pen of cattle purchased; (4) daily changes in the competitive conditions of the live cattle market; and (5) competitive conditions in the meat by-product market. I submit to you that measuring the impact of these market factors on the price received by cattle feeders in thousands of transactions over a long period of time is impossible. Merely contemplating the complexity of the task should be reason enough to conclude that the Supreme Court was right in Illinois Brick and Hanover Shoe.

If, despite these monumental problems of proof, Illinois Brick and Hanover Shoe are overturned, the courts will be left with the problem of trying cases where passing-on is an issue. While it is difficult to predict how the courts will respond to this challenge, it is distinctly possible that, at least in some cases, the courts will hold that indirect sellers are barred from recovering because their proof of passed-on damages is too speculative. If a plaintiff's proof of passed-on damages is not of sufficient quality that a "just and reasonable estimate" of damages can be made, then, under long established Supreme Court precedent for proving antitrust damages, *see* *Bigelow* v. *RKO Radio Pictures, Inc.*, 237 U.S. 251 (1946), the plaintiff will not be permitted to recover, even though he has proved that a violation has occurred and that he has been injured as a result.

In sum, the awesome difficulty of proving passing-on which troubled the Supreme Court so deeply in *Hanover Shoe* and *Illinois Brick* must still be faced. If S. 2835 is enacted, the problems of proof will be faced in the courts and it is possible that many indirect sellers, who are the intended beneficiaries of this bill, will find after a long and costly court battle that they are still unable to recover because proving that damages were passed-on cannot be done except through speculation and guesswork.

2. *Inconsistent Judgments and Multiple Liability*.

The second concern which caused the Supreme Court to decide *Illinois Brick* as it did was the Court's fear that treble damage defendants would be exposed to the risk of inconsistent judgements and multiple liability if indirect purchasers and sellers were permitted to sue. Any proposal to reverse *Illinois Brick* must address this issue.

A risk of inconsistent judgments and multiple liability is created by S. 2835 because it permits indirect sellers to compete with direct sellers to recover for underpayments received as a result of antitrust violations. In theory, this should not create a problem because each seller -- whether direct or indirect -- should only recover that portion of the underpayment which he absorbed. In fact, however, if the direct and indirect sellers can offer satisfactory evidence of passed-on damages, their ultimate recoveries may exceed the full amount of the illegal underpayment made by the defendant. This may occur because: (1) sellers at different levels of the distribution chain will bring separate lawsuits against the defendant to recover as much of the underpayment as possible and (2) measuring the amount of damage actually passed-on is inherently imprecise. If, for example, a direct seller establishes that he absorbed 80% of the underpayment and, in a separate suit, an indirect seller establishes that he also absorbed 80% of the underpayment, the defendant will be found to have aggregate liability of 160% of the underpayment before trebling. This result, which is possible in every case in which sellers at different levels of the distribution chain sue, is clearly improper and presents the threat that defendants will be found liable for damages far in excess of those contemplated in §4 of the Clayton Act.

The only foolproof method for avoiding the threat of multiple liability is to bring all of the treble damage claims by all of the claimants at all levels of distribution into a single forum. As a matter of procedure, this may not always be possible. See Illinois Brick, 431 U.S. at 738-740. However, in those cases where it is procedurally possible to bring all of the claimants into one forum, it may be impossible to try the case because of the massive number of parties and the conflicting interests among the plaintiffs at different levels of the distribution chain. As Justice White wrote in the Court's opinion in Illinois Brick:

> [A]llowing indirect purchasers to recover using pass-on theories, even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple litigation and liability, would transform treble damages actions into massive multi-party litigation involving many levels of distribution and including large classes of ultimate consumers remote from the defendant.

Id. at 470.

In sum, the risk of inconsistent judgments and multiple liability is a serious one and S. 2835 presents no means of protecting defendants from it. Without some form of protection which does not render the litigation so cumbersome as to be unmanageable, we believe that S. 2835 should not be passed.

3. Deterrence and Compensation.

The final question raised by S. 2835 and other proposals to overrule Illinois Brick and Hanover Shoe concerns the effect which such legislation will have on the twin goals of private antitrust enforcement: deterrence of future antitrust violations and compensation of victims of anticompetitive conduct. It is the view of the ABA that the direct purchaser rule of Illinois Brick, which concentrates the entire treble damage recovery in the hands of the direct purchaser or seller, maximizes the deterrent effect of the treble damage remedy. While this rule may compromise the goal of compensation to some extent, the practical problems which will result from its abandonment render such an alternative neither realistic nor feasible.

There is, moreover, a significant risk that reversing Illinois Brick and Hanover Shoe will damage private antitrust enforcement by undermining the deterrent effect of the treble damage remedy. This will result for at least two reasons. First, permitting indirect sellers to recover will dilute the potential recovery which a direct seller can obtain through a treble damage action. Second by reversing Hanover Shoe and permitting defendants to assert the passing-on defense in suits brought by direct sellers (and indirect sellers as well), the bill raises a significant new obstacle to the successful prosecution of a treble damage claim. These factors can be expected to reduce to a significant degree the incentives of direct sellers to sue because, if S. 2835 is enacted, they will be entitled to recover less than they are entitled to recover now and they will face a more difficult litigation in the process. Since direct sellers are more likely to have close contact with and better knowledge about the activities of their customers than are indirect sellers, the disincentive created by the bill for direct seller damage actions may result in a significant loss of private antitrust enforcement and deterrence.

Conclusion

The Supreme Court's decisions in Illinois Brick and Hanover Shoe were premised on three basic facts which cannot be ignored. The problems of complexity, multiple liability and lost deterrence will not vanish by passing legislation which overrules these two Supreme Court decisions. The problems must be addressed and resolved if the direct purchaser rule is to be reversed. S. 2835 fails to do so.

Senator Grassley. Thank you very much. I appreciate your testimony and particularly your summary, and I know you have submitted more for the record. I have a few questions, and if you are not under time constraints, I would like to go through them.

Mr. Rill. Fine.

Mr. Calder. Fine, Senator.

Senator Grassley. One of the main problems mentioned in connection with this bill is that, allegedly, it would encourage frivolous actions. Isn't it possible to craft a piece of legislation which would provide a remedy to indirect sellers, while at the same time, penalize those who bring actions without merit?

Mr. Rill. Senator, I do not think it would be possible to craft such a bill. We have obviously, since the *Illinois Brick* decision, given a great deal of thought to various formulations that have been proposed from time to time, as a way of modifying the Supreme Court's decision or creating presumptions which repeal it outright.

The fact of the matter is that there is an inherent complexity in the distribution of any product, and I suspect the distribution of agricultural products at least as much as others, that would necessitate new reliance be placed to some degree on elasticity of supply and elasticity of demand, such that no simple solutions other than the most arbitrary solutions would be possible.

The Supreme Court itself, of course, did cite two possible exceptions to the rule laid down in *Illinois Brick*. One is the so-called cost-plus rule operative where there is a preexisting, fixed quantity, cost-plus contract and the other is the control rule. The courts have handled the control rule on a very narrow basis, because to broaden it would run into the problems the Supreme Court was concerned with in *Illinois Brick*.

There is one obvious solution, which was cited in Mr. Vredenburg's testimony, and that is where there is a conspiracy at the direct buyer or the direct seller level, let the suit fall there. And in fact in the *Beef Litigation*, with which I am most familiar, the plaintiff cattle feeders do have surviving claims against Iowa Beef and other meatpackers, which they are litigating right now. So it is wrong to say they are out of court as a result of *Illinois Brick*.

Senator Grassley. Thank you. Mr. Calder?

Mr. Calder. Senator, I am afraid that there is probably no way to stop frivolous suits.

Senator Grassley. But there is some legislation that would encourage it more than others. We are making a special point in some legislation this year, where there have been some frivolous suits filed—tort claims, as an example—to limit those suits.

Mr. Calder. Well, yes, and the traditional way that I guess those types of suits are discouraged is that if a frivolous suit is brought, the plaintiff, after he loses that suit, is often assessed the defendants' attorney's fees. That is the way it is done in Europe. That is not the American rule. The American rule is that both parties pay their own attorneys' fees.

Obviously, if we had a rule here where an unsuccessful plaintiff paid the defendant's attorney's fees, that would be a disincentive to frivolous suits. The problem with that approach, Senator, is that you do not know necessarily that the suit is proved to be frivolous until after the trial. The expense, which Mr. Rill outlined to you, of not trying the beef case, but simply defending it, through the motion to dismiss and the motions for summary judgment, was extraordinary. To force defendants to bear that expense through what would be a terribly, terribly lengthy trial, seems to me to be terribly unfair, and the cost of that defense might be such that they would be forced to settle the case, rather than try it, even though they believed it to be frivolous.

So, my short conclusion to what I am afraid may have been a somewhat long-winded answer is that I do not know of a good way to stop frivolous suits of this nature. Short of trial, it is very hard to dismiss a suit like this short of trial.

Senator GRASSLEY. I would like to have each of you expand on the idea that plaintiffs in these suits will have difficulty proving damages.

Mr. RILL. I think that the problem that was focused on by the Supreme Court and was also focused on by Judge Higginbotham in his decision which was affirmed by the Fifth Circuit was that where a product changes form down the stream of distribution, is passed through several hands down that stream, meeting different demand structures, different cost structures, different supply factors at each level, the certainty with which the elasticities of demand or supply can be estimated, even assuming the existence of some conspiratorial overcharge or underpayment and then translated either back or down the stream, is economic guesswork by necessity.

The courts and juries simply do not and probably cannot have the skill to make these pass-on or pass-back assessments with any degree of certainty.

In the beef litigation, the court was faced with a joint cost product, some of the product going into beef, some of the product going into by-products, which was sold essentially by feeders to meatpackers. Meatpackers having to maintain certain costs at the packinghouse level, some under union contract, and thus to maintain a constant kill rate to guarantee the employment to their packinghouse workers. Confronted with that particular situation and the proof of record not establishing any functional equivalent to a cost-plus contract, there was no way in which the Court could differentiate the principles in that case from the principles in *Illinois Brick*. Now, that case is illustrative only of the types of complexities that would confront any finder of fact in an attempt to pursue damage claims down or back up multiple-tier distribution. We tend to think it is a stark example of those complexities, but I am sure that there are other illustrations that would suffice as well to demonstrate for you and the committee the types of difficulties that would be presented if *Illinois Brick* were overruled by Congress.

Senator GRASSLEY. Do you have anything to add to that, Mr. Calder?

Mr. CALDER. A little bit, if I may, Senator, and perhaps I could take advantage of Mr. Rill's chart in that regard.

To appreciate fully the complexity that we are talking about, let us focus on one transaction for just a second. In the *Beef* case, the alleged undercharge occurred in this transaction. In order to determine how much of the undercharge was passed back to the cattle feeders for one transaction, you have to determine how much of the undercharge was absorbed by the packer on today's sale to the grocery store, and figure out how much of it he is going to pass back to the cattle feeder on tomorrow's purchase. I do not know how to do that for one transaction. When you have to do it for millions, or tens or hundreds of thousands of transactions, among many packers and many cattle feeders, you have to come to the conclusion that the task is impossible.

To try to prove that in a trial format cannot be done with any degree of precision, certainly, and probably not with any degree of accuracy. All you can really do is have an expert witness—an economist, in all likelihood—look at the situation and make a guess, an educated guess, perhaps, but nothing more than a guess.

I do not think that is an appropriate way to measure damages, and the Supreme Court has said in a number of decisions that it is not appropriate in an antitrust damages case to measure damages by speculation and guesswork. That is inevitably, I think, the situation that you have when you try to prove passing on.

Senator Grassley. Let's suppose this legislation were passed. Would you see obstacles to the enforcement of the legislation if it were to pass?

Mr. Rill. Well, I think one of the obstacles that I mentioned in the summary of my testimony is the fact that the legislation itself invites the kind of calculus that both Mr. Calder and I were discussing, in attempting to allocate alleged damages among two or more tiers of distribution.

The bill makes no effort to create any kind of presumptions unlike, for example, Senator Gorton's bill. But even if it did, it seems to me that the attempt to determine what the actual damage is, at a level once-removed from the alleged violator, whether it is an indirect buyer case or an indirect seller case, will inevitably create complexities that will vitiate the effective enforcement of the antitrust laws.

I think one of the serious losses in enforcement that we would suffer if this legislation or any Illinois Brick overrule legislation were passed, would result from the loss of enthusiasm for direct buyers or direct sellers to bring antitrust cases. They would inevitably be confronted, virtually as third-party defendants themselves, in attempting to prove that they did not pass on or did not pass back the damages. And I think that would be a serious loss in the effectiveness of the antitrust laws, as did the Supreme Court in the *Illinois Brick* decision itself.

Senator Grassley. Mr. Calder?

Mr. Calder. Let me approach your question, Senator, from another angle, and that is the viewpoint of the indirect sellers who will sue under S. 2835 if it is enacted.

As I mentioned in my last answer, the standards for proving antitrust damages as set forth by the Supreme Court are that a plaintiff is required to offer evidence from which a just and reasonable estimate of damages can be made. If a plaintiff cannot do that, if the damages can only be measured on the basis of speculation, he is not entitled to recover anything. Because of the complexities involved in trying to measure the pass-on of the undercharge back up the chain of distribution, I think it is entirely possible in, perhaps, many cases that plaintiffs, even if they could prove antitrust violation, would recover nothing, because they would be unable to prove the amount of their damages by means other than speculation.

So it is entirely possible that plaintiffs who would be permitted to sue under the bill, who go to great effort to sue and, in fact, prove an antitrust violation, will still not be able to recover because they will be unable to meet the very lenient standards which have been established for proving antitrust damages.

Senator GRASSLEY. That is the end of my questioning, but as I said to the previous panel, you may expect questions in writing from Senators who cannot be here. We would appreciate it if you could respond to those in 15 days.

Our hearing now is completed. I want to thank you, the previous panel, and the audience. We appreciate it very much, and we encourage further dialog on this issue.

The meeting is adjourned.

[Whereupon, at 4:30 p.m., the committee was adjourned.]

[The following material was subsequently supplied for the record by James J. Calder:]

REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW TASK FORCE TO REVIEW PROPOSED LEGISLATION TO REPEAL OR MODIFY *ILLINOIS BRICK*

The report which follows was prepared by a Task Force composed of representatives from the Civil Practice and Procedure Committee and the Private Litigation Committee of the American Bar Association Section of Antitrust Law.[1] *This report and its recommendations were approved by the Antitrust Section Council on August 4, 1983. A copy of the legislation discussed herein, S. 915 and H.R. 2244, is appended at the end of this report.*

I. INTRODUCTION AND SCOPE OF REPORT

The purpose of this report is to provide a framework for evaluating proposed legislation designed to repeal in part the Supreme Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[2] and *Illinois Brick Co. v. Illinois.*[3] The majority of the Task Force members subscribe to this report, which opposes the proposed legislation because it permits indirect purchaser suits without solving the problems identified in those suits. Those problems are: dilution of the deterrent effect of treble damage recoveries, overcomplication of treble damage proceedings, introduction of unwieldy investigations to trace overcharges, and the possibility of double recoveries and inconsistent judgments. One member of the Task Force concurs in the conclusion of this report, for reasons that differ from those contained in the report. Two members of the

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[1] Members of the Task Force were Richard G. Schneider, Kimba M. Wood (Co-Chairmen), David L. Foster (Council Liaison), Jean W. Burns, James J. Calder, Edward D. Cavanagh, Mary Jo Eyster, Lee A. Freeman, Jr., Thomas R. Jackson, Janet L. McDavid, Joseph L. McEntee, Jr., H. Laddie Montague, Jr., Robert Pringle, Edward C. Schmidt, Stephen Susman, and Robert P. Taylor. In 1978 the Antitrust Section appointed a Task Force to study alternative solutions to the problems identified by the Court in its opinion in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and that Task Force submitted a report to the Antitrust Section Council later that year. The 1983 Task Force's work differs from that of the 1978 Task Force in that the 1983 Task Force focused on analysis of pending legislation rather than on developing alternatives to the Court's *Illinois Brick* ruling.

[2] 392 U.S. 481 (1968).

[3] 431 U.S. 720 (1977).

Task Force disagree with the majority, and their Minority Reports are included at the end of this report.

The report includes as a background a brief summary of relevant cases, beginning with the Supreme Court's ruling in *Hanover Shoe*. In that case, the Court held that an antitrust violator may not assert a passing-on defense in order to escape civil liability for an unlawful overcharge once the direct purchaser has proved injury and the amount of damages. Following the decision in *Hanover Shoe,* lower courts considered, and disagreed, as to whether the *Hanover Shoe* reasoning required courts to deny indirect purchasers the right to recover damages for overcharges allegedly passed on to them.

The split in the lower courts was resolved by the decision in *Illinois Brick*. Relying on *Hanover Shoe,*[4] the Supreme Court ruled that plaintiffs who purchased goods indirectly from an antitrust violator could not recover damages for overcharges passed on to them through a chain of distribution; the cause of action for an overcharge resides solely in the direct purchaser. After discussing the primary aims of the treble damages remedy, compensation of antitrust victims and deterrence of antitrust violations, the Court concluded that attempting to allocate treble damages to each person in the chain of distribution in proportion to the overcharge paid by each would undermine the deterrent effect of the treble damage remedy in two ways. First, it would dilute the interest of any one purchaser in suing; second, the difficulties of proving what factors determined each pricing decision at each level of distribution would render treble damage litigation too burdensome and too costly for the parties and for the judicial system. Finally, the Court was concerned that multiple recoveries would result if both direct and indirect purchasers were permitted to sue for the same overcharge.

The *Illinois Brick* decision to further the aim of deterrence at the expense of compensation to all alleged victims has been controversial, and has spawned voluminous commentary and numerous legislative proposals. These legislative proposals have attempted to strike a different compromise of the competing policy interests from that struck in *Illinois Brick.*

The proposed legislation examined in this report is the most recent attempt to permit recovery by the ultimate consumers; each of the two pending bills, S. 915 and H.R. 2244, attempts to limit the burden of litigation by permitting: (1) state attorneys general to sue as parens patriae on behalf of natural persons; and (2) state and federal government entities to sue as ultimate purchasers. The bills do not contain any provision for simplifying the tracing of overcharges through the chain of distribution, the major problem identified in *Illinois Brick*. Both bills leave in place the right of direct purchasers to sue for any overcharges they absorb, but neither bill provides a mechanism to bring the potentially conflicting claims of direct and indirect purchasers into the same forum in all cases.[5]

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[4] The Court concluded that, if it were to allow indirect purchasers to sue, it must overrule *Hanover Shoe*, and allow defendants to assert a passing-on defense.

Because the principal areas of controversy between proponents and opponents of indirect purchaser suits have been whether such suits (1) enhance or undermine the deterrent effect of the treble damage remedy, and (2) render treble damage litigation unmanageable and unduly costly, this report focuses on these two issues. The report also points out, however, certain deficiencies in the proposed legislation which are unrelated to deterrence or to burden and cost.

II. THE EFFECT OF *HANOVER SHOE* AND *ILLINOIS BRICK*

A. *HANOVER SHOE* AND OFFENSIVE USE OF PASSING-ON

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[6] plaintiff-shoe manufacturer claimed that the "lease only" policy of defendant-shoe machinery manufacturer violated Section 2 of the Sherman Act.[7] Defendant urged that plaintiff had not been injured because plaintiff had passed on any overcharges to its customers. The Supreme Court rejected this "passing-on" defense, because tracing overcharges through the chain of distribution would: (1) lead to undue complexity in antitrust suits; (2) dilute the incentive of claimants to sue by permitting recovery by those with only a "tiny stake" in the litigation; and (3) undermine the effectiveness of the treble damage remedy. The Court's holding stressed problems in determining price-output decisions in the "real world" rather than the "economist's hypothetical model" and the "normally insurmountable" problem of proving that the first purchaser could not or would not have increased its prices, but for the overcharge. The Court, however, did suggest that in certain narrowly defined situations, such as where the first purchaser and indirect purchasers are parties to a preexisting cost-plus contract, the passing-on defense may be sustainable.

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[5] The Senate bill, S. 915, makes certain parties indispensable under Fed. R. Civ. P. 19 where the defendant asserts passing-on as a defense; neither the House nor the Senate bill addresses the issue in the context of a suit commenced by an indirect purchaser.

[6] 392 U.S. 481 (1968).

[7] 15 U.S.C. § 2.

The *Hanover Shoe* decision dealt only with the use of passing-on as a defense, and left unanswered the question whether the same reasoning barred the offensive use of passing-on by purchasers seeking to recover on account of overcharges that were passed on to them by other buyers. Lower court decisions on this point were inconsistent.[8]

B. *ILLINOIS BRICK*

The offensive use of passing-on was examined by the Supreme Court nine years later in *Illinois Brick Co. v. Illinois*[9] where the State of Illinois and seven hundred local government entities claimed that the price they paid for buildings included overcharges for concrete blocks that were passed on to them by intervening parties in the chain of distribution.[10] Relying on *Hanover Shoe*, defendants sought summary judgment dismissing these indirect purchaser claims.

The Court was confronted with the question of whether to reaffirm the principles of *Hanover Shoe* or to modify them by permitting multiple claims to the same overcharges by plaintiffs at different points in the distribution line. The Court chose to follow the *Hanover Shoe* reasoning, and to disallow the offensive use of passing-on.[11] In explaining its decision, the Court first reasoned that allowing offensive but not defensive use of passing-on would create a serious risk of multiple liability for the defendants: a one-sided application of *Hanover Shoe* would create a presumption that the direct purchaser is entitled to full recovery while preventing the defendant from using that presumption against the indirect purchaser-plaintiff.

Second, the Court concluded that proof of damages due to passing-on would be nearly impossible; demonstration of how each sales price was influenced by the initial overcharge would have to be repeated at each point at which the goods changed hands before they reached plaintiff.

Third, the Court concluded that the antitrust laws would be more effectively enforced by concentrating the full recovery of the overcharge in direct purchasers. It reasoned that apportioning recovery among different levels of purchasers would increase the overall complexity and cost of the suit and dilute each claimant's interest in suing by reducing the benefits to each plaintiff. The Court stated that many indirect purchasers would have such a small stake in the suit that even if they were entitled to a recovery, only a small percentage would be likely to come forward to collect damages. The Court also stated that the added uncertainty regarding how the overcharge would be apportioned among plaintiffs at different levels would further reduce the incentive to sue.

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[8] *Compare In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973) (indirect claims allowed), *with* Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (indirect claims barred).

[9] 431 U.S. 720 (1977).

[10] In *Illinois Brick*, the claimed overcharge was imposed by concrete block manufacturers, who sold to masonry contractors, who sold to general contractors, who in turn sold buildings to plaintiffs.

[11] As in *Hanover Shoe*, the Court recognized that certain exceptions to this prohibition may be appropriate where: (1) there is a pre-existing cost-plus contract; and (2) the direct purchaser is controlled by its customer.

C. THE IMPACT OF *ILLINOIS BRICK* ON PRIVATE ACTIONS

Since *Illinois Brick,* the federal courts have generally rejected indirect purchasers' price-fixing claims,[12] except where injunctive relief has been sought,[13] or where the case fits into one of two exceptions recognized in *Illinois Brick*: (1) there is a pre-existing cost-plus contract; or (2) the direct purchaser is owned or controlled by its customer.

Lower courts have, for the most part, construed these two exceptions narrowly; to fit within the pre-existing cost-plus contract exceptions, the plaintiff must show: (1) that there was a pre-existing contract between the direct purchaser and its customers; (2) that the contract provided for an automatic pass-on of the full amount of the overcharge to the indirect purchaser; (3) that the middleman (the direct purchaser) was insulated from injury by the contract; and (4) that the contract committed the indirect purchaser plaintiff to buy a fixed quantity regardless of price.[14] As to the controlled purchaser exception, the question of how much control or ownership is necessary to come within the exception is still largely unanswered.

Courts have held that *Illinois Brick* is not a bar to indirect purchasers in the following types of cases: (1) monopolization claims by indirectly injured parties;[15] (2) claims involving price discrimination under the

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[12] Some courts have applied the *Illinois Brick* rationale in cases where there is not a single line of distribution from the antitrust violator to the plaintiff. Plaintiffs who purchased from non-conspirators have in some cases also been barred from recovering from price fixers. *See* Midwest Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979).

[13] *See, e.g., In re* Beef Industry Antitrust Litigation, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

[14] Jewish Hosp. Ass'n v. Stewart Mechanical Enters. Inc., 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); Lefrak v. Arabian American Oil Co., 487 F. Supp. 808, 818-23 (E.D.N.Y. 1980).

[15] Chatman Brass Co. v. Honeywell, Inc., 512 F. Supp. 108 (S.D.N.Y. 1981).

Robinson-Patman Act;[16] and (3) antitrust actions stemming from alleged violations of the Commodity Exchange Act.[17]

There has been some considerable speculation concerning whether the Supreme Court was correct in assuming, in both *Hanover Shoe* and *Illinois Brick,* that the antitrust laws will be enforced most effectively by permitting direct purchasers to recover the full amount of any overcharge, rather than by apportioning the overcharge among direct and indirect purchasers. The principal challenge to this assumption has come from those who believe that direct purchasers will not sue their sellers, either because they are too closely aligned in interest with them, or because they fear retaliation.[18] Because there is little empirical data available showing whether direct purchasers have been deterred from suing, the Task Force undertook a study to determine the extent to which direct purchasers have sued their sellers for antitrust violations since *Illinois Brick.*[19]

Although the Task Force was unable to obtain complete statistical information concerning the incidence of direct purchaser actions, the survey results show that direct purchasers do sue irrespective of ongoing supplier relationships, that these suits are sufficiently common, and that the threat of suit serves as a deterrent.

In addition, it is the Task Force's view that recoveries by direct purchasers have been sufficiently large to serve as a deterrent to antitrust violations. For example, the class action brought against corrugated manufacturers, all of whom ultimately settled with the class, generated a fund in excess of $300 million.[20] Other major cases brought by direct purchasers included *In re Folding Carton Antitrust Litigation* (settlement over $200 million);[21] *In re Fine Paper Antitrust Litigation* (settlement over $500 million);[22] *In re Eastern Sugar Antitrust Litigation* (recovery of over $25 million);[23] and *In re Ocean Shipping Antitrust Litigation* (recovery exceeded $50 million).[24] The foregoing list is not exhaustive.

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[16] Schwimmer v. Sony Corp., 637 F.2d 41 (2d Cir. 1980). Robinson-Patman cases should not be treated as cases presenting the passing-on issue because the fundamental inquiry is different. Proof of a Robinson-Patman price discrimination claim requires a purchaser to show that its competitors gained an advantage, and that it was injured, by a difference in the prices they paid for the same product. Proving what a price would have been, absent the discrimination, does not present the same problems as proving pass-on of the overcharge in a price-fixing case.

[17] Strax v. Commodity Exchange, Inc. 528 F. Supp. 936 (S.D.N.Y. 1981).

[18] *See, e.g.*, 129 Cong Rec. H1549 (daily ed. Mar. 22, 1983) (comments of Rep. Rodino).

[19] The study is described in the Appendix to this Report.

[20] *In re* Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex. 1978), *aff'd in part and remanded*, 643 F.2d 195 (5th Cir.), *aff'd*, 695 F.2d 1322 (5th Cir. 1981).

[21] 84 F.R.D. 245 (N.D. Ill. 1979).

[22] 1983-1 Trade Cas. ¶ 65,475 (E.D. Pa. 1983).

An examination of the facts pertaining to the commencement of some of these actions suggests that, especially in the situation where class action treatment is appropriate, direct purchasers do not hesitate to sue on behalf of the class. Thus, in the *Fine Paper* litigation, at least 38 separate cases were filed, and at least 15 cases were filed as class actions. The court noted that "twenty-three additional cases had been filed by various lawyers, despite the fact that their clients' interests were already protected by the previously-filed class actions."[25]

In the *Corrugated* litigation, prior to the filing in 1978 of a single complaint on behalf of all direct purchasers, over 40 separate actions, most of them class actions, had been commenced against corrugated manufacturers.[26]

D. PARENS PATRIAE CASES SINCE *ILLINOIS BRICK*

Less than a year before *Illinois Brick* was decided, Congress provided a procedural mechanism for attorneys general, suing as parens patriae, to recover damages for injuries sustained by consumers:

> Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, . . . to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act]. . . .[27]

Because many items purchased by "natural persons" are purchased indirectly from antitrust violators, many parens patriae claims are viewed as barred by *Illinois Brick*.

The Supreme Court has never directly ruled on the question whether the indirect purchaser bar applies in parens patriae cases (although the State of Illinois was a plaintiff in *Illinois Brick*, it was suing as a purchaser of buildings, not as parens patriae). The Court in *Illinois Brick* mentioned parens patriae actions in a footnote, and concluded that the parens patriae statute was intended to provide an alternative means to enforce existing rights, rather than to create a new right of recovery where one did not previously exist.

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[23] 697 F.2d 524 (3d Cir. 1982).

[24] 1982-1 Trade Cas. ¶ 65,585 (S.D.N.Y. 1982).

[25] 1983-1 Trade Cas. at 70,724.

[26] *See In re* Corrugated Container Antitrust Litigation, 643 F.2d 195, 202-03 (5th Cir. 1981).

[27] Section 4C(a)(1) of the Clayton Act, 15 U.S.C. § 15c(a)(1).

Where consumers have purchased directly from antitrust violators, such as from retailers who are part of a vertical conspiracy, parens patriae claims have been unaffected by *Illinois Brick*. The State of New York, for example, recently recovered $6.7 million on behalf of consumers who were overcharged for milk by virtue of an antitrust conspiracy among 25 milk companies which forced retailers to sell at their prices.[28]

Courts have generally denied parens patriae recovery with respect to indirect purchasers where the consumer's vendor had no role in the antitrust conspiracy. In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,*[29] five states had sued on their own behalf and as parens patriae representing two classes of consumers, seeking both damages and injunctive relief for an alleged conspiracy to fix the price of refined petroleum products. Relying in part on *Illinois Brick,* the court dismissed all damage claims related to refined products except to the extent that plaintiff could show that they had purchased: (1) directly from an alleged conspirator; (2) pursuant to a cost-plus contract; or (3) from an entity controlled by a conspirator. The court also held that the controlled entity was an indispensable party. The court permitted the plaintiffs' claims for injunctive relief to proceed. Other courts have similarly stated that claims by indirect purchasers for injunctive relief are not barred by *Illinois Brick.*

E. STATE STATUTES AUTHORIZING INDIRECT PURCHASER SUITS

After *Illinois Brick,* seven states amended their antitrust laws to permit indirect purchaser suits. Hawaii, the District of Columbia and South Dakota enacted relatively comprehensive statutes,[30] while California, New Mexico, Illinois and Wisconsin merely modified their existing antitrust statutes to give indirect purchasers standing.[31]

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[28] New York v. Dairylea Cooperative, Inc., No. 81 Civ. 1891 (S.D.N.Y. Nov. 22, 1982). *See also In re* Mid-Atlanta Toyota Antitrust Litigation, 516 F. Supp. 1287 (D. Md. 1981) (states sought damages on behalf of their residents who purchased certain Toyota automobiles; court held that consumers were not precluded from recovery where their sellers were allegedly part of a conspiracy). The *Toyota* litigation was recently settled. *See* N.Y. Times, May 4, 1983, at D-2.

[29] 497 F. Supp. 218, 223 (C.D. Cal. 1980), *aff'd,* 691 F.2d 1335 (9th Cir. 1982).

[30] HAWAII REV. STAT. § 480-14(c)(1983); S.D. CODIFIED LAWS ANN. §§ 37-1-23 to -33 (1984); D.C. CODE ANN. §§ 28-4501 to -4518 (1983).

[31] CAL. BUS. & PROF. CODE § 16750(a)(1984); N.M. STAT. ANN. § 57-1-13; ILL. REV. STAT., ch. 38, § 60-7 (1984); WIS. STAT. § 133.18(1) (West 1984). The laws of two other states, Alabama and Mississippi, arguably allowed indirect purchaser actions even before *Illinois Brick*; 27 other states and Puerto Rico have antitrust statutes that might be interpreted to permit indirect purchaser actions. *See* Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall,* 34 STAN. L. REV. 203 (1981).

There are reported decisions under only the California statute. The Task Force was unable to determine whether there has been any indirect purchaser litigation under the laws of any other state. The state statutes vary significantly in complexity and scope, and the absence of case law leaves their interpretation unclear.

The state statutes compound the problems the Supreme Court sought to eliminate in *Illinois Brick.* Because there can be simultaneous federal direct purchaser actions and state indirect purchaser actions, defendants are exposed to risks of multiple liability. Discovery and pretrial proceedings in state courts are not always coordinated with federal court proceedings, which can result in inefficiency and duplication of effort. No court has yet resolved the question whether state statutes that are in conflict with *Illinois Brick* are valid.

III. PENDING LEGISLATIVE PROPOSALS

Both bills now before Congress, S. 915 and H.R. 2244, provide for only a limited repeal of the *Illinois Brick* and *Hanover Shoe* decisions. The proposals would have two principal effects: (1) they would permit state attorneys general to sue as parens patriae on behalf of consumers who purchase indirectly from antitrust violators; and (2) they would permit the recovery of antitrust overcharges paid by the United States, as well as states and their local subdivisions, even where those entities did not purchase directly from antitrust violators.

A. SUMMARY OF THE LEGISLATION

H.R. 2244, the bill proposed in the House, would effect a limited repeal of *Illinois Brick* and *Hanover Shoe* by amending Section 4 of the Clayton Act to add a new Section 4I. Subdivision (a) of this proposed new section is directed to *Illinois Brick.* It provides that:

> A State, a political subdivision of a State, or the United States shall not be barred from bringing an action under section 4, 4A or 4C solely because the injury for which the damages are sought did not arise from a sales transaction between the plaintiff (or natural persons on whose behalf the State brings the action) and the defendant.

Subsection (b), which repeals *Hanover Shoe,* is equally direct. It provides:

> In any action under section 4, 4A, or 4C, the plaintiff shall not recover for any overcharge paid or underpayment received any amount that duplicates the recovery of another plaintiff in the action or any other action, based upon the same conduct of the defendant, for the overcharges or underpayment.

The Senate bill, S. 915, also effects a limited repeal of both *Illinois Brick* and *Hanover Shoe.* It would effect an *Illinois Brick* repealer in two steps. First, the bill contains a provision (to be designated Section 4C(a)(2) of the Clayton Act) empowering the attorney general of each State to sue on behalf of his state, or any political subdivision within his state, for injury to its business or property suffered by reason of anything forbidden by Section 1 of the Sherman Act.[32]

S. 915 then provides that actions brought under existing Section 4A (injury to the United States) and Section 4(a)(1) (parens patriae), as well as new Section 4C(a)(2), "may be maintained regardless of whether such natural person, State, political subdivision or the United States has purchased indirectly from the defendant."

S. 915 would repeal *Hanover Shoe* through the enactment of an amendment to Section 4 of the Clayton Act, designated as Section 4I. That section would permit a defendant to assert passing-on as a partial or complete defense "in order to avoid duplicative liability" in actions brought under Section 4, 4A or 4C of the Clayton Act. To prove that defense, the defendant must establish that:

> some or all of what otherwise would constitute plaintiff's damages has been passed on to others, who are themselves entitled to maintain an action or on whose behalf the Attorney General of the United States or of any State is entitled to maintain an action under Section 4A or 4C of this Act.

The Section further provides that the passing-on defense must be pleaded as an affirmative defense, that the identity of the person to whom damages were passed-on must be pleaded with "as much particularity as is reasonable" and that such persons be deemed indispensable parties to the action.

B. ANALYSIS OF THE LEGISLATION

H.R. 2244 is silent as to the types of cases to which it applies and can be read to repeal *Illinois Brick* for all types of antitrust violations giving rise to damages. Thus, as presently drafted, the bill could be read to permit state attorneys general or the United States to bring damage actions for indirect injury resulting from vertical price-fixing, tying, and other violations.

The only hint of a limitation on the scope of H.R. 2244's *Illinois Brick* repealer is its use of the term "sales transaction" in Section 4I(a) ("[the government purchaser or consumer represented *parens patriae*] shall not be barred . . . solely because the injury . . . did not arise from a sales transaction by the plaintiff . . . and the defendant"). The term is not defined in the bill and, while it could be interpreted as a limitation,[33] its ambiguity makes any intended limitation too vague to be meaningful.

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[32] It is not clear to the members of the Task Force why this is included, since state attorneys general already have this power under 15 U.S.C. § 15.

The "sales transaction" language may have implications for the bill's *Hanover Shoe* repealer because that language is not used in the Section that partially repeals *Hanover Shoe*, Section 4I(b). If the "sales transaction" language in Section 4I(a) in fact limits the scope of the repeal of *Illinois Brick*, its absence from Section 4I(b) permits an argument to be made that Congress intended the repeal of *Hanover Shoe* to be broader than its repeal of *Illinois Brick*. This apparent internal inconsistency in H.R. 2244 should be addressed in any hearings which are held on the bill.

S. 915 differs from H.R. 2244 in that the scope of its repeal of *Illinois Brick* varies with the capacity in which the state attorney general sues (i.e., whether suit is brought on behalf of the state or on behalf of consumers). Its repeal is narrower where the state attorney general is suing on behalf of state government purchasers than where he is suing on behalf of natural persons. Section 1 of S. 915, which creates a new cause of action (Section 4C(a)(2) of the Clayton Act) permitting states and their political subdivisions to sue for injury to their "business and property," is limited to injuries flowing from violations of Section 1 of the Sherman Act. The other indirect purchaser actions permitted by S. 915 are not so limited: federal government actions are permitted for injuries flowing from any antitrust violation (pursuant to Clayton Act Section 4A), and parens patriae actions are permitted for "any violation of Sections 1 to 7" of the Sherman Act (pursuant to Clayton Act Section 4C(a)(1)). While this variation may not have been intended by the bill's sponsors,[34] its language clearly creates such a result.

Apart from complicating litigation by having direct and indirect purchaser plaintiffs seek recovery of the same overcharge, the proposed litigation fails to resolve certain important issues it creates, such as who bears the burden of proving passing-on;[35] and, in a suit by a state attorney general, will the attorney general be able to recover the entire damage amount passed on by the direct purchasers, or will the recovery be limited to the damage amount which eventually reached the consumers? These issues and those mentioned above should be resolved by Congress during hearings on the proposed legislation.

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[33] For example, the language could be read to preclude suit on behalf of ratepayers who, in purchasing electricity generated by certain power plants, pay rates that were elevated by bid-rigging on another plant that was constructed but never placed in operation.

[34] When introducing S. 915, Senator Gorton, one of the bill's sponsors, stated that the legislation was intended to cover only price-fixing and bid-rigging cases. 129 Cong. Rec. S3876-77 (daily ed. Mar. 23, 1983) (statement of Sen. Gorton).

[35] S. 915 answers this question by making passing-on an affirmative defense on which the defendant bears the burden of proof. It is not clear, however, that the bill relieves an indirect purchaser-plaintiff of the burden of proving passing-on to establish either fact or amount of damage. Nor is the interaction of Section 2 of S. 915 with newly-amended Fed. R. Civ. P. 11 clear. May a defendant, consistent with Rule 11, plead passing-on when it cannot then identify those to whom plaintiff passed on any overcharge?

C. PROBABLE IMPACT OF THE PROPOSED LEGISLATION

The Task Force opposes this legislation because it fails to deal with the fundamental conflict in policy which the Supreme Court has twice resolved, first in *Hanover Shoe* and then in *Illinois Brick*. Those decisions, while recognizing that compensation is a desirable objective, also recognize that as a practical matter compensation objectives must sometimes give way to manageability and fairness. The decisions in *Hanover Shoe* and *Illinois Brick* rest at bottom on the inescapable and very real practical problems which are likely to arise in indirect purchaser suits: tracing overcharges; over-complexity; possible double recovery and inconsistent judgments; and dilution of interest in enforcing antitrust claims. The proposed limited repeal of *Illinois Brick* and *Hanover Shoe*, which permits state attorneys general to bring claims on behalf of all natural persons, would eliminate none of the problems that concerned the Supreme Court. For the most part, these problems are related, not to the identity of the individual bringing the suit, but instead, to the type of injury that is alleged, and the remoteness of the injured parties from defendant. Neither of the bills now pending before Congress effectively confronts these problems. Rather, the bills merely elevate parens patriae claims over other indirect purchaser claims while ignoring the problems which the Supreme Court found so troublesome in *Illinois Brick*.

1. Tracing Overcharges and Complexity

The legislation does not address the Supreme Court's concern that tracing the absorption of overcharges through the chain of distribution would render antitrust actions so complex and costly that their effectiveness would be hindered. The majority of the Task Force believes that this concern is well-founded.

The difficulties that may arise in proving the amount of overcharge passed-on to indirect purchaser plaintiffs can be appreciated by an examination of some cases where these, or closely related, problems have arisen. In *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*,[36] defendants were manufacturers of plumbing fixtures who had allegedly fixed the prices of their products, which fixtures were sold to wholesalers and then to plumbing contractors, who then installed the fixtures for general building contractors, who in turn sold homes incorporating the plumbing fixures to new home buyers; some of those new home buyers then sold their homes to used home buyers. Plaintiffs consisted of groups of purchasers at four distinct points in the distribution line: plumbing contractors, general building contractors, new home buyers and used home buyers. The alleged overcharge by the manufacturers amounted to roughly $10 to $20 per unit. These plumbing fixtures were incorporated into homes costing from $20,000 to $30,000.

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[36] 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971).

While the ruling was based on the Court's conclusion that plaintiffs had not proved injury, the difficulty of tracing an overcharge to a remote purchaser is illustrated by the facts of the case. The court found untenable the plaintiff's contention that a builder selling a $30,000 house would have priced the house at $29,990 but for a $10 overcharge imposed by the plumbing fixtures manufacturers, rather than by basing his pricing decision on the demand in the market for homes as a whole.

Another case that serves to illustrate the hazards of allowing indirect purchaser suits is *In re Beef Industry Antitrust Litigation*.[37] While the courts in *Beef* litigation focused on the cost-plus exception in *Illinois Brick* rather than on the passing-on issue as such, problems in tracing overcharges are revealed in the facts of the case. Plaintiffs in the *Beef* litigation were cattle feeders who fatten and sell cattle to meat packers, who in turn sell beef to retail grocery chains as well as to other customers. Plaintiffs sought to prove that the middlemen meat packers made their purchases of fat cattle and their subsequent sales of beef pursuant to contracts involving rigid application of fixed pricing formulae, which constituted the "functional equivalent" of a pre-existing cost-plus (in fact "revenue-minus") contract.

Plaintiffs sought to bring themselves within the "pre-existing cost-plus exception" enunciated in *Illinois Brick* by showing that depressed prices paid to packers by retailers for beef were mechanically forced upon the feeders up the chain in subsequent sales of fat cattle. The feeders argued that they were coerced to accept these depressed prices because they were faced with inelastic supply conditions, in that the cattle had to be sold within a few weeks' time period or else their value would rapidly decrease.

The district court's discussion of the operation of the market and the factors influencing pricing was affirmed on appeal and is helpful in understanding the difficulty in attempting to prove passing-on, because the factors the court cites as obstacles to proving functional equivalency are similarly obstacles to proving passing-on. The court found that, in operation, the pricing decisions made by the parties did not permit a finding that there existed the functional equivalent of a cost-plus contract. Instead, the court concluded that the pricing decisions actually made, on a transaction-by-transaction basis, were subject to the same forces and uncertainties recognized by the Supreme Court in *Hanover Shoe* and *Illinois Brick*. The court found that the middlemen packers' pricing decisions were not made in advance without regard to interactions of supply and demand, but that a number of factors had influenced those pricing decisions: packers' individual needs, competition and negotiation for cattle, estimation of yield and grade of cattle, conditions in the cattle market and the demand fluctuations in the non-beef by-product market which was concededly uninfluenced by the retailers' alleged price-fixing behavior. Hence, the calculation of the injury passed-on at each level would not be mechanical, as in a cost-plus contract, but complex and uncertain.[38]

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[37] 542 F. Supp. 1122 (N.D. Tex. 1982), *aff'd*, 710 F.2d 216 (5th Cir. July 2, 1983).

Manageability problems under the proposed legislation would result also from the increased numbers of parties, which will necessarily complicate both discovery and trial. The consequences of introducing this increased complexity into antitrust litigation may be illustrated by the decision in *In re Antibiotics Antitrust Actions*, where Judge Miles Lord declared a mistrial in the midst of a trial which had spanned 18 months and was not then near a conclusion.[39] The length of the trial, occasioned in part by the numerous parties, was a major ground upon which the court relied in granting the defendants' mistrial motion. The court found that after seven months of actual trial time, over the course of one and one-half years, in which 136 volumes of trial testimony had accumulated, much of it was extraneous to the issues remaining in the case following the numerous settlements,[40] it would be impossible for the jury to reach a fair verdict based on the evidence relevant to the claims remaining in the case.

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[38] Even if the legislation were interpreted to allow a state attorney general to recover, on behalf of the consumer, the full amount of the overcharge passed on by the direct purchaser, without showing a pass-on at each level, the proof will differ with respect to how much of the overcharge was passed on by each direct purchaser.

[39] 1976-2 Trade Cas. ¶ 61,058 (D. Minn. 1976).

[40] By the time of trial many of the original cases had settled, resulting in recoveries on behalf of two agricultural classes of $42 million, and on behalf of state plaintiffs of $38 million. During the trial, all but one of the remaining plaintiffs settled. *Id.*

Nothing in the proposed legislation addresses the tracing and complexity problems that will certainly result from passage of either bill.[41] The effect of this failure is predictable: longer litigation; more costly discovery and pre-trial procedures; increasingly speculative damage evidence; and fewer dollars reaching plaintiffs.

2. *Multiple Recovery and Inconsistent Judgments*

While both bills seem to recognize the potential problems of double recovery, their proposed solutions appear inadequate. The only way to avoid multiple liability is to require that all claims to the same overcharge, whether made by direct or indirect purchasers, be brought in the same action. The Task Force does not believe such a procedure could be workable. Neither bill provides for such consolidation. S. 915 specifies that federal or state attorneys general are indispensable parties to all direct purchaser suits where the passing-on defense is interposed, but does not address the issue of joinder of direct purchasers where a suit is commenced on behalf of an indirect purchaser. The bill makes no provision for overcoming the procedural obstacles to consolidation that exist in most cases. If consolidation does not take place, and parens patriae actions are commenced and concluded prior to direct purchaser actions (a possibility that the bill does not address), inconsistent judgments resulting in double recovery are still possible. Once a group of purchasers has recovered, there is no legal basis for forcing that group to pay to another group of plaintiffs a portion of the recovery.

H.R. 2244, which bars plaintiffs from recovering "for any overcharge paid or underpayment received any amount that duplicates the recovery of another plaintiff in the action or any other action," also fails to solve the double recovery problem in an acceptable fashion. Rather than providing a mechanism for adjudicating conflicting claims to the same recovery, the House bill appears to encourage a race to the courthouse, by barring only a recovery that "duplicates" another recovery, and failing to address potential claims. Furthermore, the bill does not define "recovery" and it is not clear, for example, whether settlements would be deemed recoveries under the bill.

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[41] Further complications in the tracing of overcharges were suggested in congressional testimony in 1977 by a committee of The Association of the Bar of the City of New York, which described a study by economist Betty Bock indicating that the way in which middlemen mark up products creates a "multiplier" effect, by virtue of which any antitrust overcharge can be expected to result in increased profits to middlemen at each level of the distribution chain. *See Hearings on H.R. 8359 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. of the Judiciary*, 95th Cong., 1st Sess. 502-05 (1977) (statement of the Comm. on Trade Regulation of The Association of the Bar of the City of New York).

3. Deterrence and Compensation

Two goals which the legislation is presumably intended to achieve, deterrence and compensation, may actually be undermined if either bill is enacted. It is the view of a majority of the Task Force that direct purchasers are active antitrust enforcers. The bills are likely to discourage direct purchaser suits and thereby hinder the deterrent function of the treble damage remedy. At present, *Hanover Shoe* assures direct purchasers full recovery irrespective of passing-on and thus they have an undiluted incentive to sue antitrust violators. To the extent the proposed legislation overrules *Hanover Shoe,* the direct purchaser will be less eager to sue, given that it may spend substantial sums to establish liability, only to find that it is denied recovery because it passed-on overcharges. At the same time, as pointed out by the Supreme Court in *Illinois Brick,* indirect purchasers face uncertain prospects of proving that overcharges were passed-on to them; that fact combined with their generally smaller stake in the litigation causes them to have less incentive to sue than direct purchasers now have.

The legislation is intended to compensate consumers when passing-on can be demonstrated. However, the legislation does not assure that such compensation will actually be achieved in a substantial number of parens patriae cases. How will the recovered charges be channelled back to consumers?[42] What will be the costs to the states of administering the recovered funds? What costs will consumers incur in proving claims? Congress recognized the likelihood that these problems would often prevent compensation of indirect purchasers: "rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery."[43] For this reason, Congress provided a mechanism in the statute for the state to retain the "undistributed portion of the fund, which will often be substantial."[44] The difficulty in ascertaining the amounts paid by indirect purchasers and the high cost of distributing recoveries to them may well result in most parens patriae recoveries being kept by the state, rather than compensating those who were overcharged.

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[42] The difficulty in compensating consumers for overcharges is particularly acute where the purchasers do not have evidence of purchase. In late 1982, the New York State Attorney General recovered $6.7 million on behalf of consumers who were overcharged by milk producers who conspired to fix the price of milk (and who forced retailers to charge their prices). Because of the impossibility of ascertaining the recovery due to each consumer, the Attorney General proposed, with respect to defendant Dairylea, that Dairylea place coupons on its milk containers, redeemable for a 10-cent discount on the next purchase of Dairylea milk, or a 15-cent discount on the next purchase of another Dairylea product. The district court rejected the proposal as providing Dairylea with an unfair marketing advantage, and the court has yet to determine how to distribute the funds. New York v. Dairylea Cooperative, Inc., No. 81 Civ. 1891 (S.D.N.Y. Nov. 22, 1982).

[43] Hart-Scott-Rodino Antitrust Improvements Act of 1976, H.R. Rep. No. 94-499, 94th Cong., 1st Sess., part 1, p. 17 (1975).

[44] *Id. See* 15 U.S.C. § 15e

Proponents of the legislation also argue that the states and other governmental entities should be permitted to sue on their own behalf to recover their damages when they are the indirect purchasers, in order to augment the state fisc. Apart from the question of the propriety of pursuing this goal by allowing indirect purchaser antitrust actions to be brought by states, these bills leave unanswered the practical questions identified in the Supreme Court's analysis in *Illinois Brick. Illinois Brick,* it should be recalled, involved indirect purchaser governmental entities suing to recover alleged overcharges to themselves; the Supreme Court's analysis thus arose from the same type of case that the pending legislation would permit.

4. Implications for Class Actions

Most observers think of *Illinois Brick* and *Hanover Shoe* as having special relevance to large-scale horizontal price-fixing cases which are often accorded class action treatment. It is possible, however, that under the proposed legislation direct purchaser claims would not be susceptible to class treatment under Rule 23 of the Federal Rules of Civil Procedure. Certainly the passage of either bill—and the resulting inclusion of the passing-on issue, which will differ as to each member of the class—will create new obstacles to class certification. Repeal of *Illinois Brick* and the consequent introduction of the passing-on issues may destroy the "commonality" of questions of fact or law in many cases, which is a prerequisite to the maintenance of a class action under Fed. R. Civ. P. 23(a) and (b)(3). It is therefore possible that repeal of *Illinois Brick* would impair the effectiveness of the Rule 23 class action as a vehicle for treble damage recovery by victims of broad-based antitrust violations, and thereby undermine antitrust enforcement. In view of the concern expressed for the rights of antitrust victims by opponents of *Illinois Brick,* the effect of an *Illinois Brick* repeal on the continued effectiveness of class actions should be carefully considered.

IV. CONCLUSION

The Task Force, based on its study and deliberations and experience of its members, is convinced that the Supreme Court's *Illinois Brick* decision to bar indirect purchaser claims was founded on valid concerns: unduly complex proof of injury and damages, virtually insoluble procedural difficulties, potential multiple liability and diminished antitrust enforcement. In regard to the latter issue, the Task Force found substantial evidence to support the Supreme Court's assumption that direct purchasers with undiluted claims do in fact assert those claims against antitrust violators.

To the extent that S. 915 and H.R. 2244 would lift the *Illinois Brick* bar to permit certain indirect purchaser claims, the Task Force believes that the proposed legislation does not provide satisfactory solutions to the Supreme Court's concerns, and is likely to produce results contrary to those intended by Congress. Moreover, as drafted, the bills contain serious pitfalls and important unanswered questions regarding their meaning and application. The Task Force therefore recommends that the American Bar Association Antitrust Section oppose enactment of S. 915 and Section 2 of H.R. 2244.

August 1, 1983

MINORITY VIEWS OF LEE A. FREEMAN, JR.

Congress should act to repeal the rule established by the Supreme Court in *Illinois Brick.* The *Illinois Brick* rule that persons may only be compensated for overcharge damages caused by a conspiracy in restraint of trade if they dealt directly with the antitrust violators has:

1. Denied compensation to persons who demonstrably were injured by hardcore price-fixing;
2. Reduced private enforcement of the antitrust laws;
3. Rendered almost useless the provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 allowing States to bring actions parens patriae on behalf of their citizens;[1] and
4. Deprived the states and public agencies of significant revenue.

The Supreme Court in *Illinois Brick* gave three reasons for its decision. First, the Court feared that the judiciary might become bogged down by remote plaintiffs offering complex economic evidence of injury and damages. However, by blocking suits for damages by all indirect purchasers, other than those fitting into two very narrow exceptions, the Supreme Court adopted a meat ax approach to a problem which trial courts and lawyers could have approached with more precise tools.

The choice is not between the *Illinois Brick* rule and allowing every conceivable plaintiff to go to trial on every hopelessly remote claim. Under well established law, the plaintiff in an antitrust case must show that he has been injured with reasonable certainty and must show damage through a just and reasonable inference. Guesswork is not allowed now in the ordinary antitrust case, and it would not be allowed in indirect purchaser actions were *Illinois Brick* repealed.

The real question is whether an indirect plaintiff who can offer a just and reasonable estimate of damages should be allowed to do so. It is clear that in many situations indirect purchasers can demonstrate their damages.[2] *Illinois Brick*, however, blocks these plaintiffs from doing so.

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[1] 15 U.S.C. § 15c.

[2] *See* Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967).

The second policy which motivated the Supreme Court in *Illinois Brick* was to avoid procedural complexity in antitrust cases. The Court believed that the procedures necessary to avoid the danger of multiple liability for defendants and to allocate damages among different types of plaintiffs would make antitrust cases unwieldy. But though the Supreme Court's decision in *Illinois Brick* aborted development by courts and counsel of procedures to adjudicate the claims of indirect purchasers, there is good reason to believe that efficient procedures fair to defendants and plaintiffs already exist in the form of class actions and interpleader, and that additional procedures could be developed successfully.[3]

At least two approaches are available to deal with the problem of avoiding multiple-liability against defendants. One approach is to collect all possible plaintiffs in one court and adjudicate the liability of the defendants for the initial overcharge. After the adjudication on the amount of the initial overcharge, the defendants may be excused while it is determined who was harmed by the overcharge found in the initial trial.[4] Class actions could be used easily under this approach. A presumption that the direct or more direct purchaser absorbed the overcharge in the absence of clear evidence to the contrary could be used to ease the problem of allocation of damages among the direct and indirect plaintiffs.

A second approach to the problem of multiple-liability would be to repeal the rule of *Hanover Shoe* to allow defendants to assert a pass-on defense in actions by direct purchasers. Defendants should not, of course, be allowed to offer pass-on defenses based on guesswork or speculation any more that indirect purchasers should be allowed to prove pass-on through guesswork.

The third policy discussed by the Supreme Court in support of its decision in *Illinois Brick* was to further private antitrust enforcement by concentrating recovery in the direct purchasers who would, thus, have more incentive to bring suit. Experience of counsel, however, has shown that the Supreme Court underestimated the reluctance of large purchasers to sue their suppliers. Direct purchasers often will bring suit after it can be shown through evidence developed in a prior government proceeding that they have been seriously victimized. Only state attorneys general and other remote parties, however, can be expected to investigate and pursue possible antitrust violation actively, because they cannot be threatened with reprisals or interruption of service and goods.

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[3] Of course, the *Illinois Brick* rule blocks recovery even in a situation where there is only one ultimate purchaser such as in the case of bid-rigging for a government construction contract.

[4] Such a subsequent hearing is no different from many proposals advanced by business interests to adjudicate contributions among antitrust defendants by holding a separate contribution trial

MINORITY VIEWS OF
H. LADDIE MONTAGUE, JR.

An important and desired function of the antitrust laws is to recompense the victim *and* to wrest the ill-gotten gains from the violator.[1] This is particularly so in the case of per se violations such as price-fixing. The *Illinois Brick* rule, as it now stands, is too inflexible to allow these desired results to be realized. It is for this reason that remedial legislation is needed. However, the proposed legislation does not satisfy these needs.

Antitrust enforcement will be furthered if an indirect purchaser is allowed to recover when no direct purchaser is making a claim and the indirect purchaser can show injury. If both direct and indirect purchasers sue for the same violation, antitrust enforcement will be furthered if they are allowed to determine an allocation among them of the adjudged injury, assuming a violation and liability is established. This allocation may often be done by agreement between the direct and indirect purchaser or the direct and indirect classes. Although in both the *Gypsum*[2] and *Chicken*[3] cases the distribution formula related to settlement funds, those settlement funds were the result of a consolidated litigation effort on behalf of both direct and indirect purchasers. In both cases, both direct and indirect purchasers recovered and defendants were not subjected to multiple recoveries.

On the other hand, if a direct purchaser is the only one to sue, either individually or on behalf of a class, a defendant should not be able to

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[1] Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).

[2] *See In re* Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974). The *Gypsum* cases involved five class actions on four different levels of commerce. All counsel for all classes agreed on a distribution formula for settlement as follows:

1. Dealer-wholesaler class (direct purchaser)	21.15%
2. Applicator or subcontractor class (first level indirect purchaser)	21.15%
3. General contractor class (second level indirect purchaser)	10.80%
4. Governmental class (third level indirect purchaser)	10.00%
5. First builder-owner class (third level indirect purchaser)	36.90%.

[3] *See also In re* Chicken Antitrust Litigation, 699 F.2d 228, 234 (5th Cir. 1982). The *Chicken* case involved primarily four classes of purchasers, two of whom were direct purchasers, one class of first level indirect purchasers and one class of second level indirect purchasers. As in *Gypsum*, all counsel for all the classes in the *Chicken* case agreed upon a formula to distribute settlement funds.

raise the pass-on defense to avoid disgorging the "ill-gotten gain." There is no threat of multiple recoveries. Accordingly, *Hanover Shoe* need not be overturned.

There is no prejudice to a putative defendant in any of the scenarios described above. In each case, the defendant(s) must be proved to have violated the antitrust laws and to have caused injury to the plaintiff or plaintiff class. If in fact a violation and injury is proved, the defendant will be forced to give up the fruits of its illegal conduct and the person or persons injured will be recompensed. Moreover, none of the foregoing will add complexity to the case involved nor will it unduly prolong the proceedings. The integrity of the private enforcement of the antitrust laws will be preserved, and an incentive will continue to exist for both direct and indirect purchasers to pursue their claims where they believe they have been injured. Lastly, defendants will not be threatened with multiple recoveries.

APPENDIX

ILLINOIS BRICK TASK FORCE SURVEY

As indicated in the foregoing Task Force Report, the Task Force undertook a study to determine whether direct purchasers have sued their suppliers, and whether the incidence of such suits has changed since *Illinois Brick.*

There is no reliable means of detecting the incidence of antitrust violations where no suit was commenced, and therefore it is not possible to ascertain in what proportion antitrust violations are followed by direct purchaser suits. The universe of known antitrust violations is limited to successful government prosecutions and successful private actions. Furthermore, one cannot obtain meaningful before and after comparisons to evaluate the impact of *Illinois Brick* because, since the decision, virtually all private suits have been brought by or on behalf of direct purchasers. There is, however, information available with respect to Department of Justice civil and criminal proceedings and the private damage actions which followed. The Task Force decided that the only workable starting point for a survey is alleged antitrust violations identified by Justice Department actions; within that category of cases, the Task Force limited its survey to horizontal price-fixing and bid-rigging cases (where overcharges to direct and indirect purchasers are most likely to be at issue).

The Task Force prepared a list of the 308 Justice Department civil and criminal price-fixing cases filed against corporate defendants during the period 1975-1982. The Task Force then obtained the names and addresses of defense counsel in those cases and sent them a letter and questionnaire.[1] In addition to distributing questionnaires, the Task Force independently undertook to determine whether there was follow-on private litigation. The Task Force was able to obtain information on the incidence of follow-on litigation in 174 out of the 291 cases included in the survey. Although the survey results are therefore incomplete, the Task Force was able to reach certain conclusions, which are discussed below.

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[1] Names and/or addresses of defense counsel were unavailable in 17 cases. Those cases were excluded from the survey.

Since 1980, the Justice Department's enforcement efforts have concentrated on bid-rigging and price-fixing in highway construction. Approximately one-half of the cases included in the survey involved highway construction. There rarely is an identifiable private party with standing to sue for treble damages in the highway construction cases; the injured parties were generally federal, state, or local governments. The Task Force tabulated responses regarding highway construction separately, making it possible to examine whether governmental direct purchasers sued more or less frequently than private direct purchasers, and avoiding what could otherwise be a distortion in the survey results.

National Economic Research Associates, Inc. tabulated the survey results as a pro bono service to the Antitrust Section.

I. NON-HIGHWAY CONSTRUCTION CASES

It appears that private direct purchaser actions were filed or settlements were obtained in the aftermath of most government cases involving industries other than highway construction. There were 144 non-highway construction government cases filed against corporate defendants during the period 1975-1982. The Task Force obtained information concerning direct purchaser litigation or settlements in 123 (85 percent) of those cases, and ascertained that there were such actions or settlements in 96 (78 percent) of those 123 cases (or, stated differently, there was follow-on direct purchaser litigation or settlements after at least 67 percent of the government cases surveyed).[2]

Breaking the cases down between those filed before and after *Illinois Brick*, the following results were obtained. There were 50 government cases filed during the pre-*Illinois Brick* survey period; the Task Force obtained information concerning 44 (88 percent) of those cases, and ascertained that there was a direct purchaser action or settlement in 35 (77 percent) of those 44 cases. There were 94 government cases filed during the post-*Illinois Brick* period; the Task Force obtained information concerning 79 (84 percent) of those cases, and ascertained that there was a direct purchaser action or settlement in 62 (78 percent) of those 79 cases.

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[2] The survey results understate the number and percentage of direct purchaser cases because the Task Force obtained no information on 21 out of 144 cases. It is reasonable to assume that direct purchaser suits followed at least some of those cases. For example, counsel for the defendants in United States v. J. Ray McDermott & Co. did not respond to the questionnaire, although there were over 70 private actions filed in the aftermath of that indictment, *In re* Marine Construction Antitrust Litigation, MDL No. 417. This case was included in the survey results as a consequence of the Task Force's independent research, but it is impossible to know whether other direct purchaser cases escaped the Task Force's attention because there were no reported decisions or newspaper articles regarding the cases.

The survey results indicate that in most of the cases where there was no follow-on litigation, the defendants may have had minimal assets. Of the cases in which there may have been no follow-on litigation, only six cases involved defendants substantial enough to be listed in *Standard & Poor's* or *Moody's*. This suggests that the absence of ligitation in many cases may be because the defendants were effectively judgment-proof.[3] There also may have been only minimal, if any, private damages in many cases.

II. HIGHWAY CONSTRUCTION CASES

The survey results suggest that state and local governments may not file private damage actions after Justice Department cases with the same frequency as private direct purchasers. There were 147 Justice Department highway construction cases included in the survey, most of which were filed after *Illinois Brick*. Using the same questionnaire and research techniques, the Task Force obtained information as to whether there was follow-on litigation for 51 (35 percent) of those 147 cases. Of the 51 cases for which that information was available, there were damage actions or settlements in only 31 (61 percent) of the 51 cases.[4] Direct purchaser actions or settlements were thus identified with respect to only 21 percent of the Justice Department highway construction cases (31 follow-on cases out of 147 Justice Department cases).

As in the non-highway cases, however, many of the highway construction defendants do not appear in *Standard & Poor's* or *Moody's*. Thus, the absence of litigation may be the result of defendants having limited assets.

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[3] In at least one case, the defendant went out of business after the government action.

[4] As in the case of the non-highway construction cases, it can be assumed that the survey understates the number and percentage of highway construction cases in which there was follow-on civil litigation.

APPENDIX

NON-HIGHWAY CONSTRUCTION CASES 1975 - 1982

		1975	1976	January-June 1977	July-December 1977	1978	1979	1980	1981	1982	TOTAL
1	TOTAL NUMBER OF DOJ CASES IN SURVEY	18	17	15	9	25	12	29	12	7	144
2.	NUMBER OF DOJ CASES ON WHICH INFORMATION WAS OBTAINED	17	15	12	7	24	12	23	7	6	123
3.	NUMBER OF DOJ CASES FOLLOWED BY DAMAGE ACTIONS OR SETTLEMENTS	14	11	9	6	20	11	18	6	1	96
4.	PERCENTACE BASED ON #1 (TOTAL NUMBER OF CASES)	78%	65%	60%	67%	80%	92%	62%	50%	14%	67%
5.	PERCENTAGE BASED ON #2 (CASES WITH INFORMATION)	82%	73%	75%	86%	83%	92%	78%	86%	17%	78%

HIGHWAY CONSTRUCTION CASES

		1975	1976	January-June 1977	July-December 1977	1978	1979	1980	1981	1982	TOTAL
1.	TOTAL NUMBER OF DOJ CASES IN SURVEY	1	0	1	0	1	5	35	39	65	147
2.	NUMBER OF DOJ CASES ON WHICH INFORMATION WAS OBTAINED	1	0	1	0	1	5	7	14	22	51
3.	NUMBER OF DOJ CASES FOLLOWED BY DAMAGE ACTIONS OR SETTLEMENTS	1	0	1	0	1	5	3	9	11	31
4.	PERCENTAGE BASED ON #1 (TOTAL NUMBER OF CASES)	100%	0	100%	0	100%	100%	9%	23%	17%	21%
5.	PERCENTAGE BASED ON #2 (CASES WITH INFORMATION)	100%	0	100%	0	100%	100%	43%	64%	50%	61%

NON-HIGHWAY CONSTRUCTION CASES
PRE- AND POST-ILLINOIS BRICK

	PRE-ILLINOIS BRICK (January 1978 - June 1977)	POST-ILLINOIS BRICK (July 1977 - December 1982)
1. TOTAL NUMBER OF DOJ CASES IN SURVEY	50	94
2. NUMBER OF DOJ CASES ON WHICH INFORMATION WAS OBTAINED	44	79
3. NUMBER OF DOJ CASES FOLLOWED BY DAMAGE ACTIONS OR SETTLEMENTS	34	62
4. PERCENTAGE BASED ON #1 (TOTAL NUMBER OF CASES)	68%	66%
5. PERCENTAGE BASED ON #2 (CASES WITH INFORMATION)	77%	78%

98TH CONGRESS
1ST SESSION

H. R. 2244

To amend the Clayton Act to allow certain indirect purchasers and sellers to bring antitrust actions, to allow the reduction of certain antitrust damage awards, and to improve the procedures for consensually resolving civil antitrust actions brought by the United States.

IN THE HOUSE OF REPRESENTATIVES

MARCH 22, 1983

Mr. RODINO (for himself, Mr. BROOKS, Mr. EDWARDS of California, Mr. SEIBERLING, and Mr. HUGHES) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Clayton Act to allow certain indirect purchasers and sellers to bring antitrust actions, to allow the reduction of certain antitrust damage awards, and to improve the procedures for consensually resolving civil antitrust actions brought by the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Antitrust Fairness Amendments of 1983".

SUITS BY INDIRECT PURCHASERS AND SELLERS

SEC. 2. (a) The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"INDIRECT ACTIONS

"SEC. 4I. (a) A State, a political subdivision of a State, or the United States shall not be barred from bringing an action under section 4, 4A, or 4C solely because the injury for which damages are sought did not arise from a sales transaction between the plaintiff (or natural persons on whose behalf the State brings the action) and the defendant.

"(b) In any action under section 4, 4A, or 4C, the plaintiff shall not recover for any overcharge paid or underpayment received any amount that duplicates the recovery of another plaintiff in the action or any other action, based upon the same conduct of the defendant, for the overcharge or underpayment.".

REDUCTION OF DAMAGE AWARDS

SEC. 3. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4I, as added by section 2 of this Act, the following new section:

"REDUCTION OF MONETARY RELIEF

"SEC. 4J. (a)(1) In an action under section 4, 4A, or 4C, after determination of the amount of any monetary relief which would be awarded in the absence of this section, the amount of such monetary relief shall be reduced, or allocated between the defendant and any other defendants found liable in the action for the injury, if it is determined on a motion promptly made that the amount would be substantially unjust with respect to a defendant.

"(2)(A) A reduction or allocation under paragraph (1) may diminish the defendant's liability to an amount less than the plaintiff's unrecovered actual damages only if it is determined that the plaintiff's conduct of the action significantly contributed to the substantial injustice.

"(B) A reduction or allocation under this subsection shall not diminish the defendant's liability to an amount less than threefold the damages fairly attributable to the conduct of the defendant, or the defendant's sales to or purchases from the plaintiff.

"(b) A determination under subsection (a) shall be made by the court unless doing so in the absence of a jury is inconsistent with the just and expeditious conduct of the action.".

STIPULATIONS TERMINATING CIVIL ACTIONS

SEC. 4. (a) Section 5 of the Clayton Act (15 U.S.C. 16) is amended—

(1) by redesignating subsections (h) and (i) as subsections (i) and (j), respectively, and

(2) by striking out subsections (b), (c), (d), (e), (f), and (g), and inserting in lieu thereof the following new subsections:

"(b)(1) Any proposed stipulation submitted by the United States for entry to terminate any civil action, or to modify any stipulation, order, or judgment entered to terminate any civil action, brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which the action is pending and may not be entered before the expiration of the 60-day period, or such shorter period specified by order of the district court under paragraph (3), beginning on the date the proposed stipulation is filed.

"(2) On the date the proposed stipulation is filed, the United States shall—

"(A) publish in the Federal Register a copy of the stipulation;

"(B) file with the district court a brief statement describing the nature and purpose of the action or proceeding and specifying the reasons in support of the agreement underlying the stipulation; and

"(C) notify persons who have requested notification of the filing of any such proposed stipulation in the action.

"(3) The district court may shorten, by order, the 60-day period specified in paragraph (1) if the district court determines that—

"(A) extraordinary circumstances require that the period be shortened; and

"(B) shortening the period is not adverse to the public interest.

"(c)(1) After a proposed stipulation is filed under subsection (b)(1) and if the court deems it in the public interest, the court may order that—

"(A) except as provided in paragraph (2), the United States shall file with the district court, and immediately thereafter make available to the public, a copy of each document that influenced the United States to agree to the stipulation if the document—

"(i) was received by the United States from any person participating in the negotiations underlying the stipulation, except to the extent that any matter in the document is exempt under subsection (b)(4) of section 552 of title 5, United States Code, from disclosure;

"(ii) was exchanged by the United States with such person, except to the extent that any matter in the document is exempt under subsection (b)(4) of section 552 of title 5, United States Code, from disclosure; or

"(iii) was received by the Department of Justice from any agency of the United States, except to the extent that any matter in the document is exempt under subsection (b) of section 552 of title 5, United States Code, from disclosure by such agency; and

"(B) each defendant shall file with the district court a description of each communication (including each oral communication) by or on behalf of the defendant with any officer or employee of the United States relating to the stipulation, unless the communication is a communication by counsel of record for the defendant alone with the Attorney General or an officer or employee of the Department of Justice.

"(2) In lieu of a complete copy of a document described in paragraph (1)(A), the United States may file and make available a summary of any portion of the document that the Attorney General specifically certifies to the district court would, if filed and made available, impair the capacity of the United States to conduct negotiations underlying other stipulations or to enforce effectively the laws of the United States.

"(3) Before entry of the stipulation, the defendant shall certify under oath to the district court its compliance with any requirement imposed under paragraph (1)(B) and that the descriptions filed under such paragraph are accurate descriptions of all such communications known to the defendant.

"(d) The United States shall immediately file with the district court, and make available to the public, a copy of each written comment relating to the proposed stipulation filed under subsection (b)(1), received by the United States during the period specified under such subsection. The United States may, as it deems appropriate, respond in writing to any such comment and shall promptly file with the district court, and make available to the public, a copy of the response.

"(e)(1) Only after the United States notifies the district court that it has complied with subsection (d) may the district court consider the proposed stipulation filed under subsection (b)(1). For purposes of determining whether to enter the stipulation, the district court shall consider the stipulation on the basis of the record of the proceeding, including the filed comments relating to the stipulation and any filed responses of the United States to the comments.

"(2)(A) Except as provided in subparagraph (B), in the case of a proposed stipulation that would result in the termination of the action in which the stipulation is filed, without the imposition of express limitations on the future conduct of any defendant involved, the district court shall enter the stipulation unless the district court determines, by order, that there is substantial reason to believe that the United States would prevail on the merits of any of the claims in the action.

"(B) In the case of a proposed stipulation that would result in the termination of the action with the imposition of express limitations on the future conduct of any defendant, or in the termination or modification of a stipulation, order, or judgment entered in the action, the district court may enter the proposed stipulation if the district court determines that such termination or such modification would—

"(i) represent a fair compromise of the claims or issues disputed by the parties;

"(ii) advance the purposes of the antitrust laws; or

"(iii) otherwise be in the public interest.

"(3) If the district court determines under paragraph (2) that the stipulation should not be entered, then the district court, by order—

"(A) shall notify the Attorney General of the determination; and

"(B) for purposes of making the applicable determination under subsection (g)(1), shall take one or more of the actions authorized in subsection (f) if the district court determines that the record lacks sufficient information to make the determination.

"(f) For purposes of carrying out subsection (e)(3), the district court may, to the extent consistent with law and equity—

"(1) require the United States to file, and to make available to the public, memoranda of law, statements of fact, explanations, and analyses relating to the proposed stipulation;

"(2) require the United States to file, and to make available to the public, any additional documents relating to the stipulation;

"(3) require the United States to publish information relating to the stipulation;

"(4) take testimony of witnesses, including experts, and officers and employees of the United States;

"(5) appoint special masters, outside consultants, and expert witnesses;

"(6) obtain the views, evaluations, and advice of any individual, group, or governmental agency;

"(7) authorize full or limited participation in proceedings before the district court by interested persons or agencies, including appearances for the examination of witnesses or documentary materials, for participation in the proceeding in any other manner that serves the public interest and as amicus curiae; and

"(8) take such other action in the public interest as the court may deem appropriate.

"(g)(1) If, upon completion of any actions taken under subsection (e)(3), the district court determines—

"(A) with respect to the stipulation described in subsection (e)(2)(A), that it is likely that the United States would prevail on the merits of any of such claims and would be entitled to meaningful relief; or

"(B) with respect to the stipulation described in subsection (e)(2)(B), that the stipulation should not be entered;

then the district court shall order the Attorney General to reevaluate the substance of the stipulation and to file a statement describing the results of the reevaluation.

"(3)(A) If the Attorney General determines that the United States will not request the withdrawal of the stipulation described in subsection (e)(2)(A), then the district court shall enter the stipulation.

"(B) If the addition of any new party plaintiff in the action or proceeding, as the case may be, prevents the district court from entering the stipulation, then the court shall allow the United States to withdraw from the action or proceeding.

"(4) If the district court enters the stipulation or allows the United States to withdraw from the action or proceeding, as the case may be, then the district court may issue an order requiring the Attorney General to retain for any period of time all physical and documentary materials gathered by the Department of Justice in connection with the action or proceeding.

"(h) If the court determines that there is reasonable cause to believe that a stipulation was procured by fraud or other improper conduct, the court is not required by this section to enter the stipulation.".

(b) Section 5(i) of the Clayton Act (15 U.S.C. 16(h)), as so redesignated, is amended—

(1) by striking out "Proceedings" and all that follows through "this section,", and inserting in lieu thereof "Actions taken by the district court under subsections (e), (f), and (g)", and

(2) by striking out "consent judgment" and inserting in lieu thereof "stipulation".

EFFECTIVE DATES

SEC. 5. (a) Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) The amendments made by section 2 and section 3 shall take effect on March 10, 1983, but shall not apply with respect to actions commenced before such date.

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